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JOE K. LONGLEY

April 12, 1995

Honorable Curtis Seidlits
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78769

Dear Curt:

Enclosed is a copy of the House State Affairs Committee transcript from March 6, 1995. I thought you might want this to distribute copies to the other members.

With kindest regards,

Very truly yours,

LONGLEY & MAXWELL, L.L.P.



Joe K. Longley

JKL/ahw
Enclosure

cc: Honorable Steve Wolens
Honorable Sylvester Turner

HOUSE STATE AFFAIRS COMMITTEE

DTPA HEARING

March 6, 1995

Speaker

Description

The constructive notice aspect of the public records doctrine is not applicable in the DTPA dispute. The DTPA "for act of intentional wrongdoing". The DTPA allows the triar fact to award additional discretionary punitive damages based on a mere knowing standard. This standard is generally a lesser standard than that required to recovered common-law punitive damages or statutory punitive damages under the 1987 Tort Reform Act. Even though the Texas common-law does not allow the recovery of punitive damages for mere breach of contract a DTPA consumer can recover additional discretionary punitive damages for conduct which is nothing more than a mere breach of contract. DTPA liability may be imposed without _____ of contract upon third parties and what is in essence a contractual dispute. Because the DTPA treats contracts disputes as if they are tort actions the DTPA imposes liabilities on employees, officers, representatives and others involved in the contractual process to that regard to the rules regarding piercing the corporate veil and rule that an agent acting for a disclosed principal is not liable for the principal's contractual obligations. The DTPA vitiates most of the historic legal doctrines developed over the years either function to or allow businessmen to allocate the risk of lost among ourselves in any fashion other than is dictated by the DTPA. In 1989 the legislature amended the DTPA to apply the joint liability compare to responsibility, _____ for settlement and contribution concepts of the 1987 Tort Reform Act to a very small segment of the claims brought by consumers of the DTPA. Claims for damages, for death, personal injury other than mental anguish or distress associated with the violation of the DTPA that does not involve death or bodily injury and damage to property other than goods acquired by purchase or lease that is involved in the consumer's claim if that damages arise out of that occurrence. But those concepts of compared responsibility, joined liability, credit for settlement and contribution are expressly limited to those few types of DTPA. Contractual provisions such as duties providing that the goods are sold as is, limiting liability, requiring condition for liability such as notice plus an opportunity cure and the like have been consistently declared invalid in connection with the DTPA claim. Even in situations where such provisions were freely and fairly bargained for and willingly accepted by the consumer in order to obtain a reduction in the purchase price. Texas courts have held that even though the DTPA is venal in nature creates a liability unknown as the common-law and

deprives businessmen of common-law rights is to be broadly and lubberly construed in favor of the consumer. The DTPA has been judicially interpreted such that if a specific exemption for an act or practice does not appear in the DTPA this indicates the legislature intended not to exempt the act or practice from the coverage of the act. These policies and concepts are so radically extensive and potent that the DTPA affectively subsumes existing Texas system of contract law and tort law. {I'm glad somebody wrote that for me so I....

Laughter

Don't ask me any questions about what I just read alright? Now let me bring you up to date Mr. Chairman..

I have the same question

Yeah

HARD TO UNDERSTAND WHAT'S IN BRACKETS [I tell her I wanted a name] yeah I wanted to know the same thing...

Let me bring you up to date. Since this bill was filed in the Senate by Senator Bivins and myself in the House, Senator Bivins and Todd Hunter, Bob Duncan and myself intermittently have not been very involved since we started _____ with the Appropriations Act. Have been meeting to try to narrow what the questions are that we can agree on. There are a number of things I will tell you and I believe some of the witnesses who will come, Joe Longly has been involved on behalf of the trial lawyers, Clark Martin who cannot be with us today from Vinson & Elkins in Houston has been involved for business on this issue. There have been a large number of issues that have been or at least some number of issues that have been narrowed. This bill does not represent the status of those discussions. And obviously those discussions are not binding on this committee nor are they binding on the House but it has been an attempt to try to find those issues in which commonality can be reached in which something can be presented to this committee and ultimately to the House as saying "here are things that we agree need to be changed and some direction for that". Some of the--most of these that my understanding is--involves such things in mediation and so you're going to see some things in this committee substitute that probably do not reflect the status of where I think the bill that I would like to ultimately present to the committee or the subcommittee for passage. There are some things that I will tell you that are in these committee substitute, they're pretty

controversial. Limitation of professional liability obviously is something I don't think is going to be resolved in my opinion perhaps _____ that is provided in this bill that professionals are exempted if they are covered by errors and omissions insurance or have paid into the recovery fund. It applies to people considered by _____ responsible for a service providers' actions.

Steve Would you have any minimum amount statutorily required for an errors and omission policy or would you just say any old policy?

Junell I think that's a good point Steve. Right now my understanding is there's not an amount contained in the bill and that needs to be...

Steve Is that something that you think would be good?

Junell I think it probably would be. But there needs to be a minimum amount. Because obviously if you have a 5,000 errors and omissions policy it is a way to get around what is the issue of having errors and omissions insurance.

Steve So we would then not require an E&O policy of any particular amount but by an entity getting it they would buy themselves out of the DTPA.

Junell That's right. And basically, this, let me kind of go through the list and you've got this summary. It's this summary of this, basically what this bill does is that a person may waive rights under the DTPA if represented by counsel as long as that counsel was not represented and what we're trying to get, it is not the problem with the person with the toaster or even the problem with the automobile. Where the problem in many cases has been with the DTPA and perhaps in its' use is sophisticated business people who are represented by counsel who the deal goes wrong from one side or the other now using that as a hammer on people. So in this--under this committee substitute--no this is a business bill.

Steve Well as far as what I understand is the problem has been as you've listed it there Rob and others have given it to me is that this has gone outside of the consumer transaction and progressed into big business where big boys is suing big boy and they use it as the hammer.

Junell Well and I think if you look at one segment of people that are interested in this bill I think that's true. There are other people, I'll give you an example: real estate people--most realtors don't--the majority of the homes they sell I would think are in \$100,000.00

range average you know, on either side of that, so obviously they're interested in this bill. This bill does provide remedies for consumers in contract and transactions not larger than \$500,000.00 so that if you're transaction involves \$600,000.00 or \$700,000.00 or \$5 million obviously you have persons in there that you're not looking at your ordinary consumer. There is a definition of consumer in this. It strikes partnership or corporation, it limits this and I will say this is one of these issues that needs to be discussed. Huh?

Steve

Well with limited liability, partnerships and other types of business entities I can just shield myself by changing the identification of my business.

Junell

And so that's the definition of consumer is one that needs to be I think it's one of which there is obviously conflict in that particular. The question the Insurance Code § 2121 and it's relationship--you know you have a cause of action under the Insurance Code for unfair insurance practices--there's also a provision in the Deceptive Trade Practices Act--do you have--which do you do--do you multiply those issues and we'll have someone come up and discuss the mechanics of that work. The definition of what economic loss is and whether or not someone in the d_____ pecuniary loss as opposed to mental anguish someone who and I think this is one of those areas in which take it out of wrongful death personal injury but you go into a business deal someone may be upset about it but is there mental anguish and should there be a recover of the travelling of damages for mental anguish in that situation without physical injury being involved. There is change in the application of the knowingly standard and there are intentionally for the punitive damages aspects. Again I think one of the biggest portions is that this bill does not apply to professional service if the individual primary services is covered by malpractice or errors & omissions insurance or has paid into a recovery fund. And I'll give you an example: someone comes to an attorney for instance for professional advice on writing a will. They write the will, the will doesn't turn out the way they thought it should have been. There is a cause of action for legal malpractice. Should it also be a deceptive trade practice? Someone goes to an accountant and they say here is a situation--you do an audit of our business, you render an opinion, there is a cause of action for the negligence of that accountant. Should there also be an additional cause of action for deceptive trade practice? A lot of these have come out of it said you have multiple remedies and if you provide a professional advice--it's _____ in terms in this bill of persons who are listed to pay the professional tax under Article 10. These include of course,

medical doctors who are already out by their own practice act, medical doctors rep, dentist, optometrist, chiropractors, psychologists, CPAs, architects, engineers, attorneys, real estate brokers, security dealers and veterinarians because they all pay the \$200 professional fee.

Auctioneers, auctioneers

Steve I'll be glad to call on you but it's not my committee Ms. Danburg but...

Danburg Laughter

I know it, we're were just discussing auctioneers--we had them in here earlier...

Well I think it's a _____ new _____ **[TWO PEOPLE TALKING AT SAME TIME]** from the State if we kind of said look if you pay \$10,000.00 a year to the State you would be exempted from DTPA. I...

Laughter

_____ said Denver

I mean they're so glad _____ to another _____ ...

Yes mam' there are some very attractive things about that. Can you tell me theoretically why you or I as attorneys _____ to a lower standard of honesty in our dealings _____ or a use of _____. **[TALKING IN BACKGROUND COULD NOT HEAR DISTINCTLY]**

Yeah, and I think you go back. If you render a professional opinion whether it applies to attorneys or accountants or this other laundry list of people that you get and I think that's the question.

But you're going beyond the professional opinion and you're absolutely right, if the professional opinion is not accurate then you can sue for negligence.

That's right.

Steve You can sue for breach of an implied contract. But there is a separate bit of conduct that you're forgetting about and that is in the advertising. It's the Deceptive Trade Practice which you have

not discussed with us. Chiropractors, lawyers you go through everyone of these and all you have to do is look at your TV guide on a Sunday and you'll see nothing but advertising from the professionals that we're leaving out of here.

And Steve you and I agree 1,000% on this professional advertising. I'm on the...

Steve Except you're carrying the bill and I'm not so...

Well I would you like to join...

Steve There's some difference with us right here...

Okay, laughter

And I agree with you.

Steve If we agreed then...

Junell/Steve But _____ again [two people talking at same time] and I think that is an issue that needs to be--if the cause of action is based upon a professional opinion--that's something then that perhaps this committee wants to exempt as opposed from I represent myself as being a board certified in the State or not even board certified. I represent myself as being able to do bankruptcies and I've never done a bankruptcy in my life and you show up and I mess up your bankruptcy, then it's based upon a representation that I have made.

And at that point it seems that we're really making a mockery of the Deceptive Trade Practices Act and you're making a mockery of it to the people that you're saying that it was intended for--the little guys. It's the little guys that will often pick up the TV guide and look at the advertising from a professional and follow that advertising which is very often deceptive. I don't think you'll hear any argument from me or any of the supporters of this. It is based upon express you know express advertisement or warranties--I don't think you'll hear any disagreement from anybody.

Steve Now the way it is worded though, it would include, it would exclude...

Junell That's correct...

Steve Any deceptive trade practices for the profession...

Junell And that's the reason why I say these are some of the things that are still in fluid and still in motion and still trying to get resolved...

Steve Now when you say that it's fluid and in motion, tell me what you feel in your heart as good public publicity.

Junell I agree with...

Steve Does Rob Junell feel in his heart that there should continue to be a cause of action against professionals for deceptive trade practices deception in the trade. Deception in the marketing.

Junell In the marketing, yes.

Steve Alright.

Junell I mean I don't have any problem with the marketing aspect of it. Here's what I have a problem and of course you and I both have dealt--all of us that are lawyers on this committee have dealt with clients and say "You know I'll take your case, I'll do your best and I go do my best" and it's hard--lawyers are not an easy group to defend anyway and so you know...

Steve But your bill defends them so that's why I wanted to ask about _____....

Junell Yeah, but I'm saying if you'll take some of the other groups--let's take a group for instance like CPAs, you have someone who says I need some tax advice and you say good, here's my tax advice. The tax advice is wrong. Have they committed a deceptive trade practice or have they committed professional negligence?

Steve You're right about that but there is a enormous amount of advertising that goes on by the CPAs too and I understand but I am drawing a distinction between the conduct itself and the marketing...

Junell Okay...

Steve There's a difference between the two...

Junell You and I probably agree on that. I'm just not able to articulate how it should be placed out in here.

Steve But you believe that there should be a distinction drawn in the bill?

Junell I don't have any problem with that at all.

Steve Now you've mentioned the CPAs and we've discussed the lawyers. Discuss with me a honest group of folks the healthcare providers.

Junell Okay.

Steve Now in this bill you would say that all healthcare providers--and put it in a different way--insurance companies. You would say that insurance companies...

Junell Insurance is not covered here.

Steve Is not covered here...

Junell Insurance is not covered cause they don't pay the professional tax under the statute.

Steve So the Deceptive Trade Practices will not effect 2121.

Junell The bill I think effects 2121 but insurance agents themselves are not excluded from...

Steve I want to discuss 2121...

Junell I'm probably not the person to discuss. I'll have somebody up here to discuss that with you if I could Steve.

Steve Without doing it specifically, just generally tell me how it....

Junell I can't

Steve Alright, alright.

Junell And let me tell you why. I worked on punitive and joint several
_____--

Steve I know you did.

Junell I started the DTPA and we started markup and so I have not been involved in any of the discussions and so...

Steve Of the people that here to testify on why 2121 should come out of DTPA who do you think is the most articulate to discuss it from a policy point of view?

Junell Well I don't even know if I could say--I am going to tell you who's here, that may be better.

Steve Okay.

Junell Scott Sheehan is here from the Business Law Foundation...

Steve That's alright...

Junell And that's who I would rather rely upon...

Steve That fine...

Junell And if he says it's somebody else then that's...

Steve Ron _____???

Junell Yeah.

Steve That's fine...

Junell Somebody else. You'll have the list--what I would rather do is turn this over, there is a problem with the Deceptive Trade Practice Act in my opinion on how it's being implemented under law right now. That's the purpose of this bill. Again there have been discussions Joe Longly has been involved and others have been involved in trying to resolve some of those differences and trying to get some common ground and then to lay out for the committee and the subcommittee those areas in which there can't be agreement on. I would like to call at this time Scott Sheehan from the Business Law Foundation. There is a number of other witnesses that I'm sure that will be here as well but Scott...

Steve Rob, Ashley Smith, is Ashley Smith present...

Junell Ashley Bob...

Steve Ashley

Junell He doesn't have his hearing aid in today.

Steve Did you want to present or ask Rob to present some witnesses in a panel format? Was that your request?

Chairman, no we would _____ submitted those _____ committee we've asked that _____ legal aspects [TALKING IN BACKGROUND, VERY HARD TO UNDERSTAND]

Junell Okay, Rob you're the author, who do you want for Scott Sheehan?

Rob I believe _____ I think Scott will probably be the best person to ask some of the technical questions that Steve had.

Junell Well then just tell us who you want next.

_____ myself.

Steve Let me tell you--Hart Martin who was suppose to be here. Clark has had some illness in the family today and that's one of the reasons he couldn't be here. He's been the one who has been involved with in some of these negotiations and meetings and so I think Scott would probably be the next...

[PERSON TALKING IN BACKGROUND--CANNOT UNDERSTAND]

You want to get both of them up here Mr. _____?

How about you?

[PERSON TALKING IN BACKGROUND--CANNOT UNDERSTAND]

You handle it however you want.

Scott how do you feel, I think Scott would be...

I think _____

I think it really would be helpful to have both of them because it is a pretty sweeping bill and I think you might get instead of having to wait for it.

Okay.

I would ask that whoever is going to testify on this bill to try to keep your testimony on a factual basis and try to tie in your

assertions to some type of specific situation where you know of a harm coming to a Texan or to the Texan economy. In other words tie it in to everyday practices of business and keep in mind the overriding concern as to whether or not it is good public policy for Texans and for this legislature and this committee to change the way we handle consumer transactions in this state. If you would since the law is sitting out there and you'll are trying to change our mind I would look upon those that are in favor of the bill as the proponents of the bill. We've heard a lot of talk about clear and convincing evidence, preponderance of the evidence and other standards of burdens of proof, I tend to look at changing the law as a little higher standard than preponderance of the evidence. So if you would talk to us in terms of presenting your factual evidence on the basis of clear and convincing since we've talked about that in the punitive damages bill. Be sure and talk about it in light of does this do--what does it do for a Texas consumer--what does it do for Texas small business--you know, what's the reasoning behind why we should change the public policy in this area and if you would identify yourself and who you represent that would be most helpful.

Sheehan

My name is Scott Sheehan and I'm a Houston attorney. Been practicing there since 1976. I'm a member and director of the Texas Business Law Foundation which is a non-profit association here in Texas. I'm with both small and large corporate members as well as large law firms and small law firm members. I think I'm with the smallest law firm in the Foundation. I'm not sure if that's good or bad but I am. _____ in Houston. I might add, I'm the former chairman of the Consumer Law Section of the State Bar as well as a member of the Business Law Counsel of the State Bar. And in fact I consider Joe Longly and Bill Maxwell and David B _____ and Mike C _____ as friends although I'm not sure if they'll agree with my testimony here today. That's my background. I might add too I really have spend a lot of time over the years with deceptive trade practice statutes. I have a good fortune of a young lawyer as early as 1977, really just a baby lawyer at the time to hear the first major institute talk in Houston about the statute. I've spent a lot in consumer law compliance work, I've spent a lot in my practice representing businesses and help them then comply with this statute. The Credit Code, the _____ to the Lending Act, the Equal Opportunity Act, you know name it and to me it is one large body of law which I call consumer law and I've seen this area of law develop in the last 20 years. I think by in large it's a good area of law and I think a lot of what this session is about as I understand it, it's an opportunity to really look and see what we've learned as a state in the past 20 years. You know _____ this statute as

well as others and look at the issues of fairness and look at how the perhaps gets more bounce back in the law so I'm not hear to tell you that the DTPA is a bad law, I don't think it is. I think it's one that I've always felt can be improved, it can be enhanced. I think it's something that's been a good _____ to taxes and hope we can improve it and that's what I'll be here to try to convince you to do.

So you're representing the Texas Business Law Foundation?

Sheehan Yes sir, and I'm here as a volunteer and I understand I am sworn to tell the truth.

Steve Yeah, you'll have to fill out your witness acclamation. Richard...

Richard Yes

Steve Okay, you want to tell us who you are and who you represent?

Josephson I am Richard Josephson. I practice law in Houston with the law firm of Baker & Botts. I have a trial practice. I have grown up under the Deceptive Trade Practice Act. It was enacted right after I started practicing law and I have had to practice under it for some 22 years and have had the opportunity to experience in terms of where it started, what it was originally intended to do and what I believe it has become and I am here as a practicing trial lawyer, a member of the Bar because I believe that the statute while still have a purpose under Texas law and still a need has to have some serious reforms because how it's been used and what it's been used for as a substitute for the underlying common-law and other statutory remedies that Texas law has afforded. It's basically taken over all of the other common-law remedies and statutory remedies as a means of finding an easier way to find liability against defendants in a whole variety of settings for which I believe this Act was never intended to apply particularly products liability in other areas which I would like to discuss.

Steve Okay and who do you represent here today?

Josephson The Texans for Lawsuit Reform Group.

Steve Okay. Alright.

Josephson I have--we basically have a number of witnesses who have asked to testify before this committee to represent different areas of specialty in practice in their professional societies and professional associations. Before calling upon them to come up and testify,

what I would like to do if I might, just for a moment, put in context some of the reforms as we see them and why we believe they're necessary. We'll be brief but it might help the committee in terms of seeing who are the other witnesses who've come to testify fit in in this process and if I might with the Chairman's indulgence just take about a minute in order to do that, it might help some if that's the format that you would like us to pursue.

Steve Well let me tell you, did Rob have to leave?

Rob I'm right here. Yes sir.

Steve Rob, I didn't know we could block you out...

Rob Yes sir.

Steve Back there. Do you have witnesses that are going to talk about the economic impact on Texas?

Yeah.

Steve Okay.

And I didn't know, Mr. W_____ asked some technical questions and these fellows are much more...

Yeah, we'll ask those...

_____ so I didn't know if....

I always follow the Chairman's leads, so I don't mind waiting.

Yes, there are some witnesses who can testify as to that...

That's alright, I just want to get, we can go ahead and ask the questions and then there seems to me under the bill there's a distinction or we're attempting to make a distinction between professionals and whoever else gets sued under this act or takes advantage of the act as a claimant or a plaintiff. And I know there's a lot of associations, I saw some engineers and accountants and all those folks who are here.

They all want to pay tax now cause the substitute provides if they're taxed they get....

That's right

_____ I just want to ask you one quick question before you get to far along.

Sure.

With respect to the examples that you cited...

Yes

Is there anything in this bill that would affect the recovery of those individuals or make it harder for them to recover?

I don't believe so. In addition to that they have their traditional in addition the consumer still has his traditional he or she have their traditional causes of action or remedies in additional to DTPA which...

Really but is the burden greater under this bill and I just want to stick to the examples that you cited that we all agree with and that you agree with and that those individuals should have _____ to recover under deceptive trade?

Right.

But I and I just want to know with respect to what you're putting in the bill the intentional portion for example...

Yes

Does that make it harder for those individuals to recover under this bill?

It does if their seeking punitive damages.

Okay

It's a different standard...

I understand what you're saying...

knowingly that we have...

I understand what you're saying...

Okay.

I just want to use your examples.

Right.

Those are the type of individuals that should be allowed to recover, correct?

Sure.

And with respect to those examples that came into existence when deceptive trade came into existence, you have no problems with the way was intended at that time for those examples?

Yes, except that the standard was written in terms of strict liability...

I understand that I just...

If a person was innocent for instance if I sold these services and I was totally innocent and had no intention of defrauding the person-- something went wrong, then I'm automatically liable under the statute as it is currently set up.

And I understand that, I just want to make sure. I want to take the examples that you cited that you believed those individuals that you believe those individuals should have a right to recover under deceptive trade and if we just focus on those on those examples you would not be coming forth advocating a change of the law if we were sticking with those specific examples, right?

That's true.

Now, so what I want to ask you, are you advocating changes in the law that would make it more difficult for those individuals that you cited in your example to recover for example the intentional _____, the knowingly standard, the definition of economic damages as oppose to actual, will those individuals that you cited have a harder time to recover under this particular bill?

I don't believe they will because the cases I cited are so egregious that I don't believe they've had a difficult time recovering under fraud which is a much harder standard. I don't believe that--there are 5 causes of action I can think of that currently exist under Texas law that would protect those people. I don't think that they'll have a harder time recovering.

I understand that and I'm not so much concerned about the other areas of the law. I'm talking specifically about the deceptive trade practice.

Right.

You will agree with me though that they will have to approve that their version of proof will be a little bit higher under this bill as compared to the deceptive trade as it presently stands. Is that a fair statement?

Not for the basic violation, no the laundry list would remain in _____, it remains in this building.

I understand...

The same laundering list

I understand that...

_____ the 24 or 25 laundry lists and violations remains in this bill.

Let me ask you this, with respect to what they might recover...

Yes.

Utilizing the economic standard would they recover less under this bill than they would recover under the present system?

The bill was written to cover all situations all the way up to \$500,000.

I understand that but if we're not dealing with the situation that would bring in \$500,000 with respect to those specific examples that you cited would they recover less under this bill than they would under the present system.

The same. Absolutely, because what in the examples that I gave the examples are economic loss and up to \$500,000, that's what the current legislation prescribes. The old legislation says it doesn't have a limit.

It says actual.

It says actual and it doesn't have a limit and it has a provision for mental anguish if that's what you're asking.

As to the point that I'm making, I want to make sure that we're not missing each other.

Okay.

Under the bill that you're advocating...

Yes

The examples that you cite, the people in those examples could stand could recover less under this bill and than under the present system. That is a true statement isn't it?

Not in my view but I'll...

Mr. Chairman

I think you may be ah

_____ has a question.

Mr. Josephson is the kind of lawyer that I would like to represent me, he's very good. And I don't say that in a bad way but I see these guys over here shaking their heads and I would wonder if you would please ask Mr. Longly to come up and just respond to that narrow issue because I find Sylvester's question to be good and I would like to know if there's a legal mind perhaps as good as Mr. Josephson who could respond and say whether as to those specific acts that Mr. Josephson thinks should be preserved and should continue to be protected under the Deceptive Trade Practice Act if there will be any change in how those cases are handled if this bill passes as is. And would you please call Mr. Longly just to respond perhaps to that narrow question to Mr. Josephson.

Could I have a chance first please.

Alright.

Joe have you filled out a deal?

Joe No sir.

Okay if you'll come up here and give since these are the proponents Scott you can go ahead and respond to Mr. Willis and what you wanted to _____...

Scott Okay

And then Joe if you would respond to Representative Turner's question after he talks.

Scott Okay.

Go ahead.

Scott Thank you. Thank you Mr. Chairman. Representative Turner in response to your question, my understanding is...

You got to speak into the mic, Scott, we're having a hard time hearing.

Scott My understanding is that the bill as drafted the one that I've seen today would change some of the rights that the consumer has under existing law and that clearly a part of what this bill is trying to do is change the DTPA and it does attempt to change what the consumer ought to be entitled to under law in these type of claims but to me the real question is are these changes fair and do we wind up with a more fair law and specifically with respect to damages, yes this bill focuses more upon economic damage which I understand is meant to lessen the risk we have in public policy we having what is called soft damages which is often in the eyes of the beholding jury how much you get and it's one of the types of soft damages that scares the heck out of business and that business is asking you to put you know safer perimeters on that so we can still achieve our most vital function at the courthouse in my view and that is to make sure that consumers get compensated for actual economic injury and we need more safeguards to protect business against abuse of lawsuits with respect to soft damages. So I think the answer is yes, it does change it and I think in a good way.

Do you agree with that?

Do I, yes I do.

Okay. Joe Longly who are you representing?

Joe I'm here representing myself and Texas Trial Lawyers Association. I've been active in some of those negotiations that Representative Junell mentioned to you.

Okay, Representative Willis has asked that you respond to the question set forth by Representative Turner and if you would answer that in light of the comments given by these two gentlemen.

Joe I'll be happy to Mr. Chairman and specifically Representative...

Only _____ as narrowly _____

Joe But I'm going to give you the narrow 60 second answer. It changes basic consumer rights that consumers have right now. In just the examples that were given to you by the gentlemen.

Refresh my memory, one was selling books...

Joe Ah...

Mr. Josephson mentioned selling...

Joe Encyclopedias or whatever that turned out to be false. Running back odometers was another example. Many of these are listed in the so call laundry list. The current law would be changed to make it more difficult or in fact impossible for consumers to recover in three ways at least. One would be where the consumer was suing for mental anguish. The proposed substitute takes away the right to sue for any mental anguish whatsoever by the consumer so you could not get it that way.

Second..

Joe Second would be where you were suing as a consumer and you were trying to sue a professional and the professional had engaged in some of this conduct. Under those circumstances you could not recover, you could not sue the professional for it. The professional Deceptive Trade Practice. The third way and probably the more the more onerous provision is that under current law the burden of victimizing someone falls upon the seller. In other words if they make a misrepresentation but they really didn't know it was a misrepresentation the burden for at least giving the person's money back or paying them their actual damages falls on that person. This bill would make you have to show under the laundry list you have to show in order to get just your economic loss, you couldn't get mental anguish at all but just to get your economic loss you would have to show that the act was knowingly violated which is a far departure. A much heavier standard than what is under current law. So the consumers that these gentlemen have been talking about would have a much more difficult time to recover in just these circumstances that we would all agree would be onerous and tenuous type of consumer practice.

Thank you. Okay you'll can go ahead with your presentation.

Could you turn that microphone _____

Sure. I did not _____ prepare remarks. But what I would like to do is go through a few highlights of the bill where I feel I have something to say.

Okay.

Experience and knowledge which I think are issues which may be material to you. Just give me my point of view and answer questions _____ helpful. With respect to the issue of limiting consumers

individuals I personally believe that that is the focus of this bill. Should have _____ going back to 1973 and ah...

Mr. Chairman

It's the pattern which is used in all federal legislation...

We can't hear...

Would you start over?

Yeah would you. Let's speak or get right in front of the mic please.

The proposal to redefine consumer....

Yeah {talking in background-can't hear, need to check mic}

Testing...

Too short...

Pretend you're fixing to be paid by that microphone, get real close to it.

_____ sing _____ would that be better?

Okay.

The one proposal to change the definition of consumers to where it equals individuals is the pattern which has been used in federal you know consumer legislation going back with the enactment of the Truth and Lending Act in 1968 and it's worked very well in the federal context and I think it's really the best place to put public policy here in Texas as well. It really starts to focus this area of law on the true consumer the individual who buys a personal family or household use and you don't get in to all the mixed issues of public policy which you do if you if you involve businesses and larger transactions. I believe the proposal to limit the act to transactions of \$500,000 or less likewise is advisable. It would be still one of the most aggressive consumer state laws in the country and would have the dollar amount well over the threshold you normally see in federal law for example Truth and Lending is \$50,000 so it really is I think a healthy amount. It picks up most home transactions so I think that's a good one.

I read through ah Chairman Junell's bill and I haven't looked through the substitute but in detail I was looking for where the definition and the proposal is. Where it says consumer meets an individual ah that's all I guess, page 4, section 4, whatever...

Page 4, line 2.

Okay line 2 and you take out partnership, corporation this state or _____, okay if I'm a small business but I happen to be incorporated, okay and big XYZ manufacturing comes in and misrepresents some parts that go into, component parts that go into my widget machine okay. I'm not afforded then any rights under the DTPA as a small incorporated business against XYZ manufacturing is that correct?

That's correct.

Even if it's \$50,000, \$5,000 or...

That's correct.

Or \$500,000...

And the argument is...okay I'm sorry.

I have a concern that a small businessman much the same as Mr. Turner, Representative Turner indicated ah is having their rights of recovery cut back in this type of situation. Just verify for me they're out.

It's a change, yes sir.

Okay.

They're out.

Who does that benefit? Does that benefit XYZ manufacturing, the big guy?

I think it benefits the entire business and legal environment in the State of Texas.

But if we were not so concerned about the legal environment of Texas...

Representative Willis is going to finish up right quick...

Laughter

Should that be our goal from this committee to protect the legal environment of Texas?

Well I say, well I mean legal environment, the context of the reputation _____ {too much talking} rest of the country. This

deceptive trade practice statute has been heard of and believe me it's known throughout the country and I know of specific businesses who I've been called in to represent on special projects who have gotten into trouble in this State for one reason or another and in my opinion they're good companies that try to do things right and they will not step foot in this State because of the DTPA and the Texas Consumer Credit Code. I know we're not here to talk about that but when I say legal environments, I mean the reputation of Texas for harsh and _____ law.

But we want to discuss facts and no longer the reputation apparently sells well in the Senate but I don't know that reputation is going to persuade me or a lot of other people here and I prefer discussing facts, examples, caselaw and things that I understand tangibles.

No I don't mind.

I'll try to do a better job of _____ but to me it's a real point, it's one that I've lived with, so it is real to me whether it's real to you or not. And that's a very honest answer.

When you say that people are afraid of their concerns and they go ooh and ah because we're in Texas ah I've seen that imprint a lot that we're concerned with perception but I would like to deal with the facts. Now if you would like to relay specifics with me, I find that were persuasive. I want to go back to something that Curtis said because it seems like what we're doing in the legislature is to replay what's going on in Congress. There are people that take the sides of big business and then there is the side of little business. And there's businesses fighting businesses and I think that's what we're doing with the joint and several, I think it's the big business getting the upper hand over little businesses. There are a lot of mom and pop operators that are partnerships. There are a lot little partnerships out there and I've worked with you in the Texas Business Law Foundation on changing partnership law and I've worked with you on the limited liability corporation.

Not _____ you're right...

I understand but to do a partnership it just takes two people, just takes two people to have a partnership and there are a lot of partnerships that are out there that you read in the newspaper that a particular xerox company is going to offer them some kind of service or they get something from Dell Computer and for \$199.00 Dell will give them the extended 3-yr. warranty. And they read it, they buy it, they get it and it doesn't turn out to be true and how do you go around suing for \$199.00 or how do you sue for the \$2,000. Your law firm, the small

law firm won't take it and your law firm is a big one and they sure won't take that case. And what I'm curious about is why the partnership, the husband, the wife partnership who had been deceived on a installment contract or a service contract how no longer they have the benefit of the deceptive trade practice where their limits with their damages are only a thousand or two thousand dollars.

Our response to you would be in part this.

Could you speak in the microphone?

Or talk louder.

My understanding is that this law was enacted in 1973 based upon testimony by then Attorney General John Hill that this statute only applied to intentional misconduct and really only applied to consumers in the traditional sense. And we have a bit of unique creature here in Texas. Now in a way the burden is being placed on us to come forward and say why we should change something. I think part of the answer was wrong in the first place that it was just too zealous a public policy then and what we're asking for is bounce and fairness and yes a body of laws in this State that would be more fair to the honest business person that does make mistakes and yet does not want to be accused of being a deceptive business person. I mean it is a bad perception, it's the same way that people under the federal law do not want to be called racketeers.

But my question is you're hurting the little business. I'm looking at page 4, line 3, line 2 of page 4 of your substitute. You're saying that if you get together as a partnership and you are a small business that you can no longer use the Deceptive Trade Practice Act.

I believe it's unnecessary...

Even if it's against Dell Computer...

I believe it's an unnecessary remedy...

Even if Dell Computer or even if their lawyer or even if their accountant or even if their insurance agent or even if their securities broker was deceptive in their advertising, you don't think they should have any remedy under the Deceptive Trade Practice?

I am personally more in favor of giving of substantial rights to true consumers and going much lighter on whether you give any special rights and remedies to the small and middle level business person for the simple reason those people are are normally able to get adequate

representation, gets plenty of other laws in Texas, this is not our only statute, I mean believe me, there's real estate fraud, there's a number of common-law theories in the past 10 or 15 years. We've also had wonderful developments from the plaintiff's side and in the area of just basic business torts when the court's have been active. You know a lot of those areas have been beefed up, I don't see the small business person needing a special Rights and Remedies _____ Act has given over the years to the consumer and when I say consumer, I mean the true consumer, the individual.

Representative Danburg

Danburg You were just saying that you were in favor of giving stronger remedies to our consumers, can you list what stronger remedies you're in favor of giving the consumers.

Talking and laughter in background.

How much _____ if I agreed personally and again I'm not one of the draftsmen here, so they shoot me, but I'm just going to answer your question honestly. I'm not sure of the waiver and provision here works very well and I would recommend that that would be looked at a little bit more. I get some concern you know about adhesive contracts and the consumer contracts and yeah but that's _____ signed by lawyers _____ practical matter. Most consumers don't walk around with lawyers at least in advance.

Talking in background. Waiver...

As I said I...

Danburg Those aren't strong provisions, those are current provisions...

Okay, oh you mean even beyond what the DTPA does now...

Danburg I thought that was what you meant when you said you were in favor of stronger provisions for consumers and not...

I don't think I meant it in that context but I am truly an advocate of having a special body of laws protecting true consumers. I mean I'm not trying to waffle but frankly you catch me off guard.

Danburg Okay. One other thing ah is it basically your position--okay the Deceptive Trade Practice Act was written in 1973.

That's correct.

Danburg Ah and is it your position that basically ah it's been amended by the legislature to go beyond the original intent that we've had a number of amendments and it's been problematical that we've made it worst for business with the amendments.

No I think actually efforts have been made to make it better for business over the years when more work needs to be done. You know...

Danburg The reason I'm asking this is that ah people who have called our office have been given the impression by your sponsoring organization that the pendulum was in one direction 20 years ago and that the pendulum has swung the other direction to be more against business, more pro-consumer and I found that to be an interesting ah perspective on the part of my consumers cause I recall voting on tort reform bills. How many times have we amended the Deceptive Trade Practice Act in the last.

Almost every session since '73.

Danburg Okay when Dick Weekly came to talk with me in my office, I asked him if he was aware that we had been dealing with tort reform and I've been on this committee since I was a baby.

Laughter.

Danburg I've been on this committee since I was younger than Brad and I recall voting on tort reform amendments session after session. He was unaware that we had had tort reform that was pro-business. He was unaware that I had voted for either all or virtually all of the tort reform bills. In fact I think that the perspective that has been promulgated to people in my district is that I am in their opinion unfriendly to business. And there have been phone banks to try to promulgate that opinion to people in my district. You're, I think you're correct that we have amended this bill virtually every session. I think that you're correct that virtually every amendment has been if anything a way that has limited the act and made it harder to recover and I am pretty sure that I am correct that I voted for tort reform every session. So I'm not quite sure why I'm being investigated amongst my own constituents by your organization.

It's not my organization.

He is appearing for Texans for Business Law Foundation.

Texas for Lawsuit Reform I believe is Richard. I did not know or have personal of that as I mentioned to you this morning about two weeks I had the opportunity to go over the bills as they were coming through the

Senate, so I am here not as part of the lobbying effort in the sense of individual contact with representatives, but as somebody who has practiced under the law. If I was to categorize this so that you could understand what I think the problem is from my own perspective and the perspective of many. On one hand we have consumer transactions and we can debate what the language should be to cover those consumer transactions and that was my original illustration whether smaller business should be involved or not. But the major problem with this legislation is the fact that it has been applied well, well, well beyond consumer transactions and that's the fundamental problem with it. It is now used in products liability litigation. It is used in malpractice litigation. It is used in virtually every type of litigation where there is either a specific law such as the Texas Securities Act and Security Transactions, or the common law which allow a whole-host of individual remedies and the other problem is that because of the general language and the fact that it was meant deliberately to be made easier to consume when it was enacted in 1973, people are getting around the intent of legislature in passing other laws that deal with specific professions or the courts in dealing with the construction of negligence or strict liability in using this statute in a manner which I do not believe was originally intended, and I say that from being an active participant in the debate and discussion when this legislation was being proposed,

Okay, well one of the things that pointed out by Mr. Woolens, by our chairman, that I think really is at the heart of this issue, where does the term consumer stop in the domino chain and therefore liability stops. My point is in the fitness equipment business. Okay. You sell somebody X, Y, you know, 14 rowing machines that are going to be this color or these aspects and then when he gets them from the company, they are not that. Okay. Obviously, the consumer who sold them to is the consumer.

Sure.

Okay, he is then next up the line. I am using a very small business man. Really, really, small business man, big guy, but small business man. He is a consumer, right?

Correct.

Okay he is getting the short-end of this stick. I mean he ordered something, sent them money up front, he got something else, he shouldn't be stuck with it. Okay.

Okay.

Is the guy next in line the manufacturer? A consumer when he ordered something and got something else and then passed it on through. So where do you stop? Is the heart of the issues whether Bob's in a partnership or not.

No, I am still trying to divide those types of transactions. That is a pure consumer transaction from everything else that this act has been applied to, so a products liability case, personal injury maybe that is a better way to say it. A personal injury case where you already have negligence where you already have strict liability, where you have, where you may have the malpractice statute, where you may have other remedies.

Well that is all true, but the end of the session they won't have any of those, so in this particular bill, I thought the whole purpose of the Deceptive Trade Practice Act was to make it so clear that you discouraged litigation and you tell somebody there is something wrong, they have got 60 days to cure it, if they are shooting straight with you and they give you what you really are supposed to be getting, there is no lawsuit. It is the essence of anti-litigation. You know, you play fair with each other and that is the end of it.

In the real world, it has worked exactly the opposite. It has been held as a club over business. It has been held as a club over professionals because they know, a lawyer has to stand or an accountant or any professional, has to be able to defend his conduct and nobody is suggesting that he shouldn't. Should he be asked to defend his conduct as a professional on whether he was negligent or not, that is whether he failed to use ordinary care, or should he be put under the umbrella of, in effect, of strict liability statute that basically is result oriented and says if, it was a bad result even if you didn't intend it, you are liable. That is the problem we have under the current legislation.

Right, I am not a plaintiff's lawyer, so I really do not know what kind of situations might come up. But if it is beyond its negligence, you know, if I were to say in an add I am the most successful lawyer in the universe and to the client I can triple your, whatever you are going to get out of this case, you go with me instead of somebody else. Those are deceptive trade practices. That is not just negligence.

Sure.

That is a deceptive trade practice, why should I be held to a lower standard than a plumber.

You, go ahead, I can answer it too.

Well, I just want to make one point is you are referring to lawyers and that is another thing I want to comment on, I do think that at least with respect to professional opinion giving, the DTPA, that those should be exempted from the Act.

How about trade practices with professionals?

The main thing that I would say about lawyers, that is the main point that I wanted to kinda talk about today is that we do, in fact, have an effective grievance process and each issue of the Bar Journal...

Nobody, you know what, I follow that stuff, I read that stuff and it is a bunch of bog. They are just a bunch of pals on there, they are pals with each other, everybody is a pal of somebody elses.

I respectfully disagree with that sir.

Debra, I am sorry, I just couldn't, sorry.

Laugh, that's fine.

No, but please continue, cause I, well liked what you were asking.

Fine.

What I didn't mean not to answer your question. What I am just trying to basically give you the perspective from our standpoint. I know there are a number of people who wish to speak and perhaps have these experiences that may be able to shed some light on some other questions that you may have. Mr. Chairman, if

They do not have a claim under deceptive trade, right?

That is correct. They have other basic that allow for legal claim, but not as consumers under the Deceptive Trade Practice Statute.

So, let's say they buy an expensive tractor ah...

Over \$500,000.00.

I'm sorry? (various voices)

Over or under or out

Right. (various voices)

If it is under \$500,000.00 and they buy a tractor, for example, and they buy a tractor based upon the representations that were made, under the way the bill is presently written, those farmers are out. Correct? They do not have a claim under the deceptive trade.

Because they are partnership.

Right.

That's correct.

And the reason why they formed the partnership was in order to pull their resources in order to buy this expensive equipment. Or a family for example, under your definition, the way it is presently written, those individuals cannot bring a claim under the Deceptive Trade Practices Act.

Right, if the transaction is involved in the main partnership.

Okay, thank you.

What is the policy reason from distinguishing between if I choose to be a sole proprietor in that same job situation I would have a claim as opposed to if my accountant gave an opinion that I should be incorporated or some other form of business entity with my family or my neighbor. What's the...

I think what the answer is that we are proposing you would be allow the same public policy choice made by Congress in 1968 to limit consumer to individuals, but in doing so, you do it 10 times higher than Congress ever has, they limited it to \$50,000.00. This bill will be \$500,000.00, so you will be giving 10 times more consumer ...

If I knew those things, then my accountant and my lawyer would represent to me or give me the advice not to incorporate or at least would give me this as one reason not to incorporate.

That's correct.

Let me ask you too, I agree with Rep. Woolens and Dan Berg, I think Debra agreed on it, at least in the opinion giving, if an engineer gives an opinion, you know, there are ways that that differentiates from the way that if they just may mess up a project. Okay. And I am not really concerned about. I am concerned about the professionals and in advertising, but not necessarily, but I am concerned about these small business with these large companies and in many cases from my experience, the small business, the only thing that you can hold a

hammer on some of these out-of-state companies that are doing business here in Texas is with some type of club, if you want to say that is is a club or with a strong law to make them do something. What is your response to that.

I do not think is it needed as you make out and I think we have other laws in Texas that work well and I think the risk of taking that is not that great and the benefit we pick up as a state will improve the reputation of laws. I don't think it's a significant factor.

I was just noticing here in the first page where you strict basically all of number, let's see, in the law still about the \$5,000,000.00 the business consumer of assets of \$5,000,000.00 or more can you relate on how that plays into litigation right now. On the waiver.

I think that is known as the Exxon amendment. It think that came in 1979 which means a really large transaction you could have a DTPA waiver.

Alright. So that's big guys with big guys.

That's what's been to date, Sir.

Okay. That's I believe that was passed back in about 1979 and it was an effort to get very large transactions out of the DTPA by way of permitted waivers.

Okay.

It was an earlier lobbying, you know a lobbying effort by a specific group for a large transaction.

Alright, I do not have clients that have \$5,000,000.00 but tell me ...

I don't have any.

If I am a company with assets over \$5,000,000.00 I meet the other provisions of the 1742 as it is now, that I have my lawyer and we waive this, then that takes me out of DTPA.

Under the current proposal, it would take you out of DTPA.

So would it be fair to say that there is a remedy, not remedy, a provision for myself as a business with substantial assets \$5,000,000.00 or more to take myself out of the DTPA, meaning of the transactions with other business of the same size or bigger.

You mean as things currently stand?

Right.

You could.

Okay, now set aside the professionals over here, say we exempt them all out..

Okay.

Who does the bill benefit the way it is drawn now. I mean who is the big winner on the bill.

The big winner is the fact that the bill will apply to consumer transactions as it was originally intended and not to every other facet of Texas law. So I think the state is ...

Okay, there could be arguments of goods and services so we just did away with all of the services, the professional services. We pass that amendment. Okay, except for maybe the marketing deals that we are talking about.

And if this \$5,000,000.00 versus \$5,000,000.00 if we left it in there where big companies could not sue big companies if they had signed the waiver of the DTPA in a negotiated contract. Okay.

Okay.

Who does the bill benefit?

It would cut out the litigation involving areas others than consumer transactions...

Alright.

and products liability..

Who are we talking about that is producing manufacturing these products. Ford? Will Ford benefit from the bill?

Sure. Any company that manufactures a product or a distributor that may have had something to do with the transaction. A garage mechanic who might have had the opportunity along the way to fix the car and would be dragged in, in a typical DTPA action. An auto repair shop on the corner.

He is going to get drug in on the joint and several bill that they passed the other day in the Senate, anyway.

Well, but here...

I am asking who really benefits from the bill given the factors that I have just laid out.

Anybody...

Is it the big companies?

Big or medium-size or small companies. Any companies. I think you will hear from some people here that the way it is being used now that some of the small businesses are being dragged into the DTPA litigation as it exists now because of the fact that it goes outside of the pure consumer transaction. So part of the argument is that if it is let to consumer transactions, then you've got professionals, you've got different sizes of businesses who are being dragged into litigation which at least...

Okay, I just did away with the professionals.

I understand, that leaves business.

Alright.

That leaves businesses.

Alright.

That leaves primarily businesses or individuals who might be dragged into litigation that is not consumer litigation.

Alright, where do we put the \$500,000.00 deal in. Now who does that benefit?

If you put the \$500,000.00...

It's the definition of the consumer transaction, it can't go above, think that is what you all say, \$500,000.00.

Right. That would clearly and again that would clearly benefit the groups who you either have taken out or who would be left if you didn't take them out. That would be everybody else other than consumer transactions.

Okay, I'm lost.

I'm lost too, and I wouldn't mind getting a straight answer if you want to ask a question.

Ah Tag, you want to ask him?

Just tell me. I'm trying to find out, like I say the professional opinions, I understand that. I understand the concern that professionals have in that area. Okay.

Sure.

We just took them out.

Okay.

And if its big boy versus big boy over \$5,000,000.00 and they negotiate and waive, then there is a gap somewhere between zero and \$5,000,000.00, I guess. That's what we are looking at and then if we pass the \$500,000.00 deal transactions less than \$500,000.00, I guess what we think of consumer buying automobiles or toasters or things of that nature would be below the five \$500,000.00.

That would all be left.

So who benefits out of that? Is it the people that make the product?

Either people who either make it or in the chain that are involved in the manufacture would be one of the major groups that would be...

The ones that are in the chain as I recall the products bill, there are supposedly innocent retailer type....

Right, I'm talking about the non-innocent retailer, that is where there is an independent act of conduct alleged to have occurred...

Well they should be in there.

Well I am not arguing that, but what we are saying is we are going...

You just told me that we would drag in those people.

Where do you want them to be, though. The real question is do you want them to be in the negligence cause of action, do you want them to be in the strict liability cause of action which is pretty tough in and of its own right, do you want them to be one on that side or do you want somebody to be able to use a consumer protection...

Alright, so you're basically, your argument is that we should just limit the causes of action available to the person that is wrong or allegedly wronged in that type of situation.

Yes, in a consumer economic type situation. He ought to be able to have his, he ought to be able to file his lawsuit and be able to seek recovery under this Act.

Okay. Rep. Bossie has a question.

Let me carry on a little further from something Rep. Woolens and Rep. Danburg both talked on. One expressed intent here is to exclude from the coverage of the Deceptive Trade Practice Act professional negligence or the various professions that you meet these conditions.

Is that all.

Yea, but I do not have on of these little deals

Coughing and laughing

Okay, another type of liability though exists where I think they brought the fact that there was a deceptive advertising or something like that--that's a little bit different than negligent. Let me cover a third type of liability ah how about stealing, I mean what happens if in the course of providing a professional service you in up in possession of your client's money and steal it. Under this act the consumer from whom you took the money has no action against you under Deceptive Trade Practice Act, is that right?

Ah, criminal acts, I don't think so, I think...

You want to go ahead and answer....

I don't know if it would or not but...

Well the Act specifically says...I mean the wording of the Act seems to be that if a cause of action arises in the course of providing a professional service then it doesn't fall under the coverage of the Act--that's the way it's worded, right?

Okay.

Okay, so if in the course of providing a professional service you steel the money, you're excluded from coverage under the Act, the consumer is and the basis for that is that if that professional is carrying professional liability insurance, right?

That's correct.

But professional liability insurance policies specifically exclude coverage for statutory _____, don't they?

I thought, I don't know. In most cases.

I think you're right basically but what I would respond to in response to that is again a question of where do you want your remedy to be because clearly as we all know there are a number of other remedies that one would have if someone stole money or embezzled money. And the real question is---which will involve reimbursement and which will involve the possibility of recovery of punitive damages and so you know the real question is do you want it under this statute or do you want it---in the other way it's allowed. Nobody is suggesting you shouldn't have it.

But why has the Deceptive Trade Practice Act _____ {too much noise} because if I have another remedy if somebody cheats me in my toaster and like you said I might have as many as five other remedies. I mean I got a common-law remedy, contract remedy, I might have ah you know a remedy for _____ what a toaster _____ but anyway ah but what we're doing or how a lawyer feels is that we're giving that person a break under the DTPA when the consumer has no recourse under the insurance policy that we're requiring as a true record _____.

I'm a little bit reluctant on this because as I think Mr. Longly and I think the sponsor mentioned to you there is some discussions that are ongoing on issues that you brought up and I know what's in our--I know what's here now but I also...

Todd Hunter tells me that some of those things are being addressed...

Right, and I'm hesitant to try to undo whatever is being done that obviously you past final mustard on but I know some of the same concerns you address had been mentioned in his--some of those discussions and are being considered and people are attempting to address them. I really came here to discuss the fundamental--which way are we going on the DTPA. Is it going to be a consumer bill or is it going to apply to all these other things and professional services as you point out are one of those things that _____ resolved.

Yeah

You have a question, you told me he had a question.

I do but there are other questions...

Okay

Representative Jones, then Woolens, Tom you got one too?

I've got a non-lawyer question. Are we hung up here on the definition of consumers, is that what I'm hearing? That the consumer can only be a single one person _____ is that kinda what it narrows to?

Page 4, volume 2.

Yeah, then the other thing that I'm kinda curious about, you're name is Richard, I believe, you cite that whatever happens to these people that being excluded, they've got other remedies but if they've got other remedies and this is an easier remedy why should we preclude them, are we're doing it just for the convenience of defining what remedies are?

Yeah

I'm kinda confused, is what it amounts to.

Okay let me put it this way, see if I can give you the answer. If you do under this _____ legislation, the way this bill has read, if you do something and it turns out wrong and you were totally innocent, that is you didn't intend for it to turn out that way, you acted as professionally as you possibly act. You did everything you could have but you represented acts and it turn out to be why. Right now under that statute you can be found guilty whereas under ordinary negligence somebody would look at you and say Representative Jones did you exercise ordinary care, that's what I want to know. Did you try to do a good job? Under this statute that inquiry isn't made. That inquiry--no one asks whether you tried, no one asks whether you tried to exercise ordinary care, no one asks whether you were prudent, they just said, did you say acts and did it turn out why. And it can turn out why you paid. Now there may be a narrow class of causes of action where that's a good law where maybe there are a _____ of circumstances, well maybe that's right. But if you start expending that to everything, it totally dis_____ the system we've lived under, we've grown up under and all of the court's decisions and statutes that this legislature has passed in other areas that basically say you got to have fault, you got to be responsible but you had to do something wrong. You had to _____ the actions that the consequence _____.

Well could we include there that recently prudent approach that if I was just totally negligent, didn't really pay any attention to what the guy said, you know going to sell the aluminum siding or whatever else you

want to put in it and I just sign the contract, never did even read it, then I would say that I wasn't very prudent if that were prudent. So could we put reasonably prudents in here and solve that problem.

There is an attempt made now to try to solve in part that problem by changing the definition of knowingly so that you had to know and that's exactly the question you've asked me is the exactly the question that others ask and that is why there is an attempt in this bill to define. It's not just that you get it, it's did you know the consequences of your act when you did it. And there's a definition of the term knowingly.

I suggest to you that if you read all of this language that's it still now going to take care of the little people that read this stuff. The people who are in West Dallas for example who have somebody _____ come around and selling them insulated windows that are grossly overpriced with extremely high interest rates and the people are there paying \$95.00 a month for the next five years for these insulated windows that don't even work and no lawyer will ever take that case cause the whole thing was only worst \$3,500 but if you add the interest rates it comes to \$15,000 and it's not a usurious rate, it's just a lot of money and the windows don't work and you'll never even get a lawyer to take the case. And I'm sure in the contract somewhere there will be something that takes care of these problems from a lawyer's point of view. That company that the sleazy agent works will have had the finest lawyers in the world prepare a wonderful contract that they'll never be able to sue them and after this thing passes that poor fellow that's buying the insulated windows will never have a cause of action, never have a remedy. And another reason they'll have a remedy is because they'll never get a lawyer to take the case.

Okay

Laughter

_____ call has a comment

No

Tom

Go ahead

This bill was originally designed or written or passed in 1973 for consumers only.

Correct

So I assume and not being a lawyer I assume that in our law we take care of partners and large corporations and other injured parties in other laws.

Correct, we have always taken care of them in traditional negligence or strict liability type of law.

So why over the years did we start putting them into this law?

Because what happened was, certain lawyers and I don't blame them, they saw this statute...

Wait just a minute, let me go back to the original act where it talked about and I can't find it right now, but it was business entities with less than \$25 million dollars assets.

Not in the original.

When was that changed?

That was changed much later.

Depends on the _____.

In the '80s

Let me look here..

It was '83 or '85

Right, that--'79. Okay '79

Well six years '81, do I hear '83, '85, '87

Laughter, sold

No but all I'm saying is that at some period of time consumer was defined as individual partnership corporation bla bla bla and we set a \$25 million on it. So somebody intended or those people that Tom's talking about to be brought under this Act at some point, is that correct?

Well yeah but they were that was really to correct the problem where businesses were using the statute, large businesses were using the statute to sue other businesses and that was initially ...

So the legislature recognized that and whittled it back or narrowed it back where we wouldn't have the problems...

As to those businesses but what...

_____ were talking about today...

Sure. But what happened though in...what happened in response to Representative Ramsey, what happened was when this statute was written as broadly, people sat around and said I wonder why this can't apply to a personal injury case. I wonder why this can't apply to a malpractice case. I wonder why this can't apply to anything and they began filing lawsuits under this statute, not as consumer actions but as actions in these other areas and then the courts came in and said well you know the statute doesn't say specifically that it's limited to just consumer transactions. And so before you know it we got a whole new body of law and it applies to everything. This legislature has worked over the years not and has really not worked on that aspect, what the legislature has done is worked the mandatory troubling you may remember that we had at one time where even if did something innocently but you did it, you're damages were automatically troubled. That was deleted in 1979. There were some other changes made on the periphery but the basic problem as we see it that this legislation is designed to cure is where do you draw the line at a consumer transaction...

Sir let me, I've got a real weak mind and I can't, if I don't ask you I won't remember but there is places in the law today where a partnership can go get relief for damages that may happen to a consumer under this bill.

I can think of five to six different ways you can..

Okay

You can bring that action today.

Alright, and there's a place where a corporation can do the same thing.

Absolutely.

There's a place where everyone in the State of Texas can go and get relief under a law other than this law.

That's absolutely correct.

Thank you.

This law mostly duplicates everything else that we already have.

Thank you.

Did you have any questions?

Representative _____ I am like several of the members who just asked questions. I am neither an attorney nor a veteran member of this committee so I'm probably going to ask some stupid questions. I'll try to keep them short. But first of all could you clarify for me, I have a whole lot of security associations, pacific associations and neighborhood associations in my district. Where do associations fall in this law? They don't look like they're expressly permitted and I just don't know under law where they go. Do you know?

They would not be individuals.

They would not be individuals. So my civic clubs and security organizations and such lose their protection under DTPA under this?

I think we're asking you to realize that they have adequate remedies elsewhere...

But they lose their protection under DTPA.

And that _____ is not needed here.

Okay.

Secondly, I'm kinda hung up over this definition this moving of knowingly to intentionally because I see since that seems to apply not to segregating people out, not to segregating types of transactions out but to me it raises the standard that you're going by and I'm looking at the definition of intentionally back here which I got on page 4 and I'm trying to understand how a good attorney like either of you all would go in and prove that somebody intentionally *i.e.* had the specific intent that the consumer would detrimentally rely on the false misleading or deceptive act of, act or practice. How would you prove my intents in that case?

I think you've got to go to the next sentence.

Alright.

Which basically says that intention may be inferred from objective manifestations that indicate that the person acted that way.

And I don't know what that means.

Well translated that simply means if I am representing you I'm going to try to find out what this fellow's track record is, how many times he's done this, what is his marking material say, what does his literature say, has he ever gotten in any trouble from that before, did he know there were any problems with this type if we're talking about written material, what kind of person is this cause.

So you've got to get either a character, you either got to prove his character or you've got to look to prior convictions or prior _____...

No but what we're asking for with intentional, you're saying I don't just want to hit you from what you took, I just don't want this may to be rewarded, paid back for the money he paid you, I just don't want him to get his attorney's fees, I want you to be punished, I want you to be punished up to at least two times or three times whatever it was this man is out. If this man is out \$10,000, I want to get another \$30,000 from you plus attorney's fees.

But I don't understand the difference and I again not being an attorney I know these things...

Sure

are defined...

Right

And I want your help with this. The current standard is knowingly, right?

For punitive damages.

For punitive damages...

Correct.

For punitive damages, right.

Right.

And that means that I am aware of what it was that I did when I committed that act which is a deceptive trade practice.

Right.

Now in addition you have to prove that not only did I do it and that I knew that I'll do it and that I knew what I was doing and that I knew that it might be deceptive but that I was intending to deceive.

No, the way I think, what we've done is if shifted knowingly. I was talking about a standard that currently existed that's basically a no fault standard. What we were asking the committee to do was in the bill to enact legislation which said that you couldn't just take an innocent person and make him responsible under this act anymore. You had to prove the act knowingly.

But he already had to have acted knowingly, didn't he?

No, absolute not.

No.

No under the revised the legislation before you, he now has to act knowingly. He did not have to act knowingly before.

Then please look on page 7 and explain to me where I'm misreading this...

Okay.

Because the language that I'm reading here says if the triar fact as existing last down towards the bottom of the page _____ finds that the conduct of the defendant was committed knowingly...

Right

Or the triar of fact may, knowingly the triar of fact may award not more etc. etc. etc. that's current law.

Current law of punitive recovery of the exemplary the equivalent of exemplary damages is a knowing standard.

And you're but that's not a no fault, that's not an unknowing standard like...

For actual damages it is, that's my point.

But the change you're making is on the punitive damages side, right...

Both sides.

Okay.

Both sides.

Then talk to me about the punitive damages side.

Okay on the punitive damage side if you'll look at intentionally and the definition of intentionally it is very close to what the old knowingly definition was. So basically we're calling it intentionally and it is stricter but it's very similar, you still look to objective manifestations. What we're basically saying is now that if you think of the old knowingly, the old knowingly used to get you punitive damages. We're now calling that intentionally. It still gets you punitive damages, still gets you up to three times the amount of actual damages. What we're building into the rest of the bill is using the word knowingly to say you can't find someone responsible if they act innocently anymore. You have to at have found that they knew what they were doing. That's the recover actual damages.

I'm sorry do you want to...

Turner

I'm gonna send it back to you, I just want to make sure that I'm clear. Under the bill that's being proposed, is it not true that you are almost merging the recovery for economic damages, step one, with the exemplary damages on the second half in terms of the standard before you can even get the basic recovery you must almost proof the exemplary damage element. You're merging the two...

No because all it says Representative Turner is that knowingly means actual awareness of the falsity deception or the unfairness of the act or practice. You have to know that. And that's all we're saying. They're people who would argue and say that you should have always had to know that but the statute didn't originally require it.

Yeah, but we can as lawyers we can go back and forth.

Right.

But I think what Scott is getting into and I'm going to throw it back to Scott is that you have the economic recovery and then you have the exemplary recovery and the way the bill is written, you raise the _____ on page 7, you're raising the standard for them both. The way this bill is written, you are increasing the standard in order for the consumer to recover the economic his economic damages and then on top of that what you are doing is that you are changing from actual damages to economic damages so you're cutting what the person can receive. So you're cutting what a person can you're reducing what a person recover and then you're raising the standard for them to recover smaller damages.

I agree with you on the first part but I don't agree with you on the second part. Namely I agree with you that the standard is being increased so that you at least had to know what you were doing on the actual damage side.

You agree with me on that, right?

That you would have to now know what you were doing.

Alright you agree with me there.

Yes.

Now lets talk about what a person can receive. Under the present law, a person can receive actual damages.

Well..

Correct.

But the actual damages and economic damages except for mental anguish are very...

You're playing games with me...

No...

And I don't want to play games. All I'm saying to you is that what a person can recover is not one in the same under this bill and under present law. They're not one in the same.

Because mental anguish has been eliminated.

Yes or no, are they the same or not the same?

No, that's what I'm saying.

That's all I'm wanting from you.

Okay.

That's all I want.

{Talking in background-cannot understand}

Can't hear you. Can't hear you.

Where does the, I'm just confused, where does the bill say you need to have a knowing violation in order to recover economic damage?

Ah on page 5 I believe that we're looking if I can tell. Bottom of page 5 under the prior _____ facts _____ that were committed knowingly. It's a little hard for me to tell where that subsection goes.

D-1746 and

Alright.

Yeah, you're right.

Ah, in fact one think that we seen to keep on forgetting here is just like good old Marvin _____, I mean the beauty of the Deceptive Trade Practice Act and my recollection of why it was passed in the first place is to say if you're a consumer and you get the _____, okay you don't get what you paid for, then you can give them 60 days notice, they can fix it and you don't have to sue at all. You don't need any lawyers, you don't need any cost, you don't need any... _____ who has every said no Marvin, I am not going to fix this you know. I promised them black carpet, he got blue carpet and sue me. Nobody does that. They don't want to get sued so they give him the black carpet he ordered. Why do you have to know if you're the carpet salesman, why do you have to know, I mean the...the guy has just finished selling me carpet the other day. Once he sold me the carpet I never saw him again, okay. If the workers had shown up with green carpet, he might not have known that I was getting green carpet but I would expect him when I called him and gave him 2 or 3 days notice to change it back to whatever color it is. You know I would have expected that without having sued him without having to go to court, if I ended up having to sue him because he said hey it's green carpet and live with it. Whether it was knowing or not you better bet I would sue him. You better bet I would expect to get more than just the new correct carpet, maybe my attorney's fees. If I had to go through that stress and have to live with green carpet until I've got the money to fix it, you know I would want something more than that but I would give him notice. I would give him his 60 days. He would give me a new carpet and we wouldn't have a lawsuit at all.

We have been handed a note a while back reminding us that there are a lot of other witnesses who I think at this point I know of _____ because I know at least me, I'm exhausted.

You'll are tired of being badgered and you'll are...

Oh no, that's fair game.

You'll have been very, you know I think you've exhibited professional ethics with us. You told us some things that you share our concerns with about this and I really appreciate it and it's also nice to know that people who are from area of Houston are going to have to get demonized along with me because we share the same concerns about the bill. I mean they'll demonize you and me for being worried about certain aspects about the thing we're looking at here.

Representative Woolens has a question.

Woolens Mr. Sheehan and Mr. Josephson, I have heard your reasoning why we need to protect the lawyers of Texas. Explain to me now why we need to protect the insurance companies of Texas for deceptive trade practices in the State.

Well we have and I'm not saying we need to protect the insurance companies or anyone else, what I'm saying is where do you want to do the protecting? That was the theme of my speech. Where do you want to do the protecting. Do you want to do it through the Deceptive Trade Practices Act or do you want to do through the other statutes that are available to do it? It's not a question of not protecting the consumer against wrongdoing by anybody, it's a question of where do you do it? Where do you draw the line?

So is it your position that if we take the DTPA remedy away from consumer deceptive cond...from insurance deceptive conduct, that the same remedies remain for consumer in the insurance code?

Do you do it under 2121, do you do it under negligence, do you do it under fraud, where do you do it?

No, in the insurance code, I thought, I heard just to say, I wish we could read back the transcript immediately, is it in the insurance code or the same remedies that are available to consumers for deception in insurance acts. Are those same remedies available under the insurance code?

Not unless you go through the DTPA.

Okay, therefore, you are eliminating some remedies to a consumer for deception by an insurance company in this proposal, is that accurate?

Under this proposal that's true, but I would point out this is another one of those areas which I felt and which is why I did not bring it up, it's one of those areas which I understand is--there are some ongoing discussions about that particular area and I don't know in which form or whether that--you're particular problem will be answered or not and

that's why I hesitated in getting involved. You're absolutely right, I want to be honest with you about the way the legislation looks now.

Tell me so that it's clear to all of us here, what remedies does this substitute eliminate from a consumer? Which remedies does it strip from a consumer against an insurance company or an insurance agent for deceptive trade practice?

This, under this legislation you go through as I understand it you currently go through Article 2121 and you have the benefit of a similar group of misrepresentations or deceptive practices which are a numerated in that statute if that's what you're referring to. And you are able to get into that statute through the provisions of the DTPA and go against the insurance carrier for and find violations under the DTPA to get into Article 2121 which you would otherwise not be able to do. If that's what you had in mind.

By passing the substitute does this benefit the insurance company?

Ah if you're talking about...

The detriment of the consumer...

As to that one area it would.

As to the area of deception.

As to the DTPA it would and I'm hesitant because as to deception fraud the answer is absolutely not.

As to a deceptive trade practice.

Sure.

So this bill would benefit an insurance company and an insurance agent to the detriment of a Texas consumer with respect to deceptive trade practices.

Deceptive trade practices but not deception.

I understand.

Because you would still have fraud and all of the other remedies...

Only if it was _____...

That are available.

Only if it was intentional deception, then you could pursue it under under fraud, is that right?

No, fraud, negligent, misrepresentation which does not require intentional conduct which you currently would have the opportunity to file an action under that.

But I understand what you're saying and I wanted to be perfectly honest with you.

Now do you, can you think of a single policy reason why insurance companies and insurance agents ah should be protected from the decept...from the ah...should...should be protected from the Deceptive Practices Act? I'm sorry.

Ah again the question is where you draw the line...

I know why, I've heard why we are protecting lawyers, I want to know why we are going to protect the insurance companies.

I didn't advocate protecting lawyers...

Somebody did.

Go ahead.

But, no I mean it would fall into the same category. Do you want to make this a consumer protection statute, where do you want to draw the line.

This is my experience and pardon me for sharing them with you and you may not care but I deal, I have seen so many people that call me up as a legislator, not as a lawyer but as a legislator and say that problems with insurance, I mean constantly problems with insurance, constantly that their automobile is in a--it's totaled, is an uninsured driver and the insurance company pays them far less than the market value and they beg me to do something about it as a legislator, then they beg me to do something about it as a lawyer, and I say you're only getting screwed by \$500.00. You're only being _____.

Laughter.

You're being ripped off by \$500.00 and I cannot help you as a lawyer and I can't help you as a legislator over \$500.00 and maybe their some law firm out there that will take on a case for the damages of \$500.00 are not very very many but at least they have the DTPA in Article 2121 to do it. And I feel my heart goes out to people that have these

problems and there's no way to--that he'll ever get even with the insurance, no way ever to make it right, you'll never make that person whole. I was just talking to someone two weeks ago who had a policy of insurance who thought they had uninsured, they thought they had uninsured, it was advertised as being uninsured and they were hit by an uninsured driver and the car was totaled. And #1 they didn't get full compensation for their automobile, I'm not talking about personal insurance, I'm just talking about payment for their car, just a car so they can go to work. They still won't have a car to go to work, it's been 2 weeks, they have not gotten reimbursed by their insurance company. I'm sorry it's been 4 weeks. They have not been reimbursed by their carrier for the total loss of their car that was recognized and realized by the carrier 3 days later. They don't have their car. Their insurance agent has not been willing to reimburse them for the premiums that are owed them and refused to canceled their policy even though they don't have a car. They refuse to cancel the policy. To me it sounds like a deceptive trade prac...it seems like that to me. I can't take that case as a lawyer. I could never that case and yet what you're trying to do is to protect insurance agents and insurance companies when they do those things to people and there's only \$500.00 damage, there's \$200 damage, your firm is not going to take that case and your firm is not going to take that case.

Not many lawyers will and interestingly the DTPA is not in particularly encouraging in the handling of a small claims but what partly happened in my experience is that because of the large dollar amounts you allow, the fact that it's not limited, if the true consumer transactions then a lot of the lawyers that have been doing those kind of cases are now basically personal injury lawyers and big time commercial lawyers making wonderful money in the very up scale DTPA litigation. And my view is the one I expressed before is to try to make this a true consumer statute and make sure that the small claims and the true consumer cases where people need lawyers are handled.

But you are hurting these people who are having their cars totalled because you're making this law tougher. And they may be making a good living but my hunch is that you folks are making a pretty good living too at your law firms.

It could be better.

Talking in background -- cannot understand.

We're discussing here why not limit why not bring some power. This law has been watered down and watered down cause people come up here every two years watering this thing down. Why not beef it up the way Mr. Josephson was talking about. Beef it up and make it mean

something for certain consumer transactions less than a blank number of dollars and you take your people who have been abused by their insurance carriers, by their insurance agents, do for the three farmers that get together because they can't afford to buy a John Deer Tractor on their own so three of them get together to pitch \$25,000 a piece or \$30,000 a piece and they probably only put down \$5,000 a piece and go out and get a loan for the rest of it as a partnership and all of a sudden they don't get the benefits of the Deceptive Trade Practice even though the agent for John Deer may have said some things that were not true. Why can't we do that? Why does that offend, why does that offend your association Mr. Josephson?

Josephson It doesn't offend me personally...

No your association...

Josephson Well, it's not my association but I mean it's...

You're here to lobby for the...

Josephson Well I'm here to speak on behalf of the bill but they could be called something else and I still feel the way I feel but I don't disagree with what you're saying, the problem is and I mentioned it earlier do you want to make that insurance company, do you want them to have a defense? What if they have another side of the story, I mean under this current law, they don't get to tell it. All they have to proof and the question is do you want them to have another side, do you want in return for toughening that law that is to make it real easy to get that insurance company, that is to have some mechanism for getting that insurance company, you want the insurance company to have a defense or not.

It is your sworn testimony that that insurance company does not have a defense and doesn't have a way to defend itself...

No I'm saying, I'm saying right now it's a no fault standard. I'm saying if the insurance, if you are sold something and it turns out somebody sold you something they thought it was X and it turns out to be Y, they're liable. Now we may all thing that find but they're liable for that conduct and what I'm saying is under this legislation it puts in a standard which requires that you prove at least they knew when they did it. That they weren't being honest with you. That they weren't leveling with you and I mean that's that's the only thing that that's that's the way I see this addition to that. As far as consumer transactions in all honesty when I came here, my focus was intended why we should treat consumer transactions over here and take everyone else where this statute had been misused in all of these other areas,

products liability or whatever it is out and solve the problem whether that's the way Representative Turner wants to do it or something else. Solve the problem of the consumer transactions, come up with something that fits the need that you gentlemen decide or ladies decide that is really--that's the way we should go with that aspect of this bill. And whether that's including partnerships or whether it's limiting the focus or the dollar amount those are things that you'll have to decide.

Do you agree that there is a problem by excluding partnerships from this, the problems that he brought out to you about two guys or three guys getting together and putting together some money, don't you think that's a real life problem and that these people who form a small partnership should be included, should have a remedy under this and not be excluded as this bill does? What do you think Mr. Josephson in your heart?

Josephson I personally think it would be unfair if somebody got tax advice and became a partnership to sell the tractors and then all of a sudden we changed the bill but I think the way to remedy that to give everyone notice and part of the attempt to this legislation I think should be to do that. That is I think right now we're talking about causes of action that accrue after a certain day in an effort to try to do that. I don't think people should be unfairly caught in the catch 22 situation where they did something relying upon an accountant or someone else and lose money on the deal. I think that they should be--I think that they should have an opportunity to get out from what--from the conduct which has now been changed just like you do with any law.

So perhaps make this apply to partnerships or whatever all these things that are formed after the effective date of this act.

And I think that they tried to do that, I don't know what the current legislation did but I think that there has been an attempt and I'll have to look at that but I think there's been an attempt only yes--the act takes effect September 1, and applies only to a cause of action that accrues on or after that date. So basically...

So basically that is not responsive at all to my question. My question was...

I thought it was...

No cause we discussed, you just said a partnership, it should not apply to people who have gotten advice to form a partnership and I asked you the question therefore does that mean that it should apply to partnerships or corporations that are formed after the effective date, now you're saying that it should only apply...

Oh I'm sorry I misunderstood you...

Alright...

At all I did not understand what your question was. Now I...

Partnership

Right

If we had a partnership and the partnership was created to do whatever that the other one is discussing and they've done certain acts isn't it fairer to have the supply to partnerships that are formed after the effective date?

If you decide to limit the size of the transaction and you say you agree to \$500,000 and that's the route that you want to take, then my personal belief is if you applied it to partnerships or to small corporations, I personally wouldn't have objections to that but you're asking for my personal views, I gave them to you. If you're...to me the key is what amount, what dollar amount that you are going to apply this legislation to. Are you going to apply it to trans...not so much and I think you'll see if you look at the various drafts of this legislation that in some of the earlier drafts, it did apply to partnerships and it did apply to corporations and the focus was...but the amount, the \$500,000 sealing was in place in all of the drafts, so I think people have gone around and I think in all probability the major reason there was a feeling that this bill should not apply to corporations and partnerships and perhaps the corporation's people we're thinking of were not the mom and pop corporations that the chairman or some of the others have described to us but I think they were thinking of the larger corporations or the larger partnerships and the purpose was to keep this a consumer bill but I think you've got a point you've made it and I think it's a good point.

I want to ask you about something else if I can that we have not discussed and part of my doing that Curtis I am interested in hearing a response from the other side about insurance companies defending themselves in that angle and perhaps you would consider when these gentlemen leave to ah so we can hear something from the other side. Sort of response and go back and forth. It would help me a great deal understanding this.

Curtis

I hate to, could I make one and I didn't mean to interrupt anybody, I sort of feel partially responsible and I don't want to be, I want at least the ladies and gentlemen of the committee to know that I've been...there are some 17 or 18 people out there who are at least waiting to speak on this side of the question. I don't mind staying as long as anybody wants

me to stay and listening to the other side and then responding, I'm more than happy to do it but in order to accommodate some of these people would it be possible to have them...

Yeah.

Be able to--their testimony is like a minute or a minute and a half a piece.

Yeah, we'll take that into consideration. Representative Ramsey has a question.

Ramsey Under the definition of professional that would include real estate brokers, insurance agents, anybody that pays a fee for a license.

Curtis Correct.

Ramsey So if I as a real estate broker if I mislead somebody that's buying a house and they are not an individual then they're not protected by this bill. If I sell a piece of property to a corporation, they're not protected.

Curtis They wouldn't be able to use this statute...

Ramsey But they would have another okay and also the partnership that buys the John Deer tractor outside of this bill they have other protections.

Curtis Absolutely.

Ramsey Right or wrong.

Curtis Absolutely, correct.

Ramsey Thank you.

Curtis It's just where you want to put it.

But it's different the Tom _____ is different, the way to go about it is different and the recovery is different. It's totally different and because it is different it effects whether or not they can get to a lawyer to do anything about it and if the lawyer won't take the case then they will do nothing about it because nobody will and that's what's happened with Tom.

Steve I wanted to ask a question if I could about mediation. Ah we have not discussed mediation...

Bill Carter _____ first Steve.

Carter I'm Representative Carter. Steve I hate to get into this when you're getting warm...

Steve No, no, no I'll remember it..

Laughter, please do.

Carter When you talk about the insurance end, having been in the insurance business for the last 45 years and I think I've had a most general experiences but I think you'll find that in most instances when people say that they're not properly reimbursed for say an automobile, a physical asset that they have in a lot of instances an inflated idea about what that asset is worth on the market, the insurance policy is dealing with market price and now when you get into bodily injury and some of those other areas, you know there can be a lot of room for argument but in most instances, the only time you ever have any problems settling a claim is when somebody is expecting you know to move.

But and for those instances, I'm totally on your side, I'm totally on your program but as a lawyer, and I don't take this case, and I've never taken these cases, and I mean I've never taken these cases, I don't take them, I mean if I did I wouldn't even make as much money as that man is, who's probably complaining for as much money as these guys over here are earning.

I'm not complaining...

But the problem and this is my experience from a month ago where the insurance company in making an offer to the insured who is someone who I know who only speaks spanish the company treated them as morons and they refused on a total to offer them their taxes. The taxes they pay as a payment. They refused to pay for the license plates that these people had paid for for their brand new car, refused to do it. I'm not talking about the value of the car, I'm just talking about all these other things because they were mexicans in the minds of this insurance companies and they're not going to pay the mexicans for it. Now what do the mexicans do then, well what most of the mexicans are generally going to do is they're going to go and well in with a variation of Debra would say they're just not going to get their money.

Laughter. They're just not going to get their money. They're going to get ripped off for a couple of \$100 dollars, nothing _____ and then these people go to their insurance period, to their agents and say would you please cancel my policy for me, you see I don't have a car anymore, I don't have a car, why should I have my policy _____ and they say no, no you'll have to talk to the insurance company, the carrier, the agent says go talk to the carrier and it is just terrible, it's egregious and

I'm talking about those and I want the DTPA to apply to that not to the value cause you're right about the value. But I'm not discussing the value of the car as being the issue, it's in taking advantage of people for small _____.

Well I, you know we can't keep people from doing bad business practices but I just wanted to make it clear you know that in most instances _____ {other people talking in background} testify.

No.

If it goes far enough that it's going to, actually winds up in the courthouse then probably 85-90% you know of all of the cases that are ever tried. You know the last _____ settlement is more than what the courts give so it's not a totally a one way street thing.

And I agree, and I agree.

But you'll never get to the courthouse.

Ah, somebody else had a question. Representative Harvey.

Harvey I'm going to learn in this committee never to yield before

Laughter

I yield about a half hour ago...

It's easy to get it back.

Just speak up.

I just want to clarify one small thing back in the discussion we had on knowingly and intentionally and I thought and I stopped because when you said something I went to look at the bill and I looked at the bill and I can't find what it was that I thought you told me. What I thought you told me was we created a new definition of intentionally that's sort of like what we used to have as knowingly and then we've changed knowingly to be something else. I'm looking at knowingly and it looks...

Knowingly is very similar to the way it was.

I mean no substitute change at all--really.

Pretty much the same but what we're saying is what that substitution is about, do you want to have in this consumer transaction, do you want

somebody to actually, do you want to require the plaintiff to prove that that person knew that what he said was false or knew that what he said was misleading and that's the addition, right now he doesn't have to, he just has to show he represented the consumer says he told me A, it turned out to be B, I was damaged. Now we're saying consumer told me A or the consumer says he told me A, the guy says I told them B but I thought it was A. Do you and that...

And I've got to prove what you thought...

No you've got to prove that what I said I said that was false that it was false and I knew it was false at the time I said it.

That you knew it was false then, that you intentionally said it to mislead me in order to get punitives.

No, that, now we're off to the punitives. We're saying to get more than actual damages or economic loss which Representative Turner and I say it's actual damages minus mental ang--economic losses actual damages minus mental anguish but in order to get more than that you have to show that somebody acted intentionally because you're asking for punitive damages. You're now moving up the ladder of conduct. To punish somebody and deter others from doing it again.

Not just that they acted intentionally because that's sort of like the knowingly standard but they acted intentionally with the intent of having the consumer rely on the misleading not just that they put that false information out and that they knew they put the false information out and that they thought a consumer might pick up on that false information but it was their intent to confuse that particular consumer.

Sure, but sure you've met that element because the two of them had transactions or if I read and he put it out for the public to see, you've met that element of the punitive, of the intentional aspect because obviously that's probably something that I think is probably the other part that it was intentional that's the harder thing to prove. I think the part that he put it out to be relied on is probably the easier part to prove.

Representative Danburg we're going to try to wrap it up with these two in just a second.

Currently you can get actual damages on proposing _____ standard _____ that it be changed to economic damages. {Speaking away from mic--every hard to understand} Actual damages caused by the wrong _____ conduct includes damages for personal injury, death, mental anguish, economic damages is intensitory damages for pun_____ including

exemplary damages, damages for physical pain, mental anguish, loss of proportion, loss to society, loss of companionship, that sorts of things. Say somebody is, some child, somebody who doesn't have any earnings to loose, a child is killed by a malfunctioning garage door, okay, fairly common case...

You're still going to get them under products...

Ah...

Strict liability...

No you'll still get them...

Ah if the son is killed, he doesn't go to the hospital very long, there's not a big hospital bill, he didn't have any income so there's not a pecuniary lost in that kind of way. I mean basically once you bury him that's the end of the pecuniary loss. What you'll are proposing is that she should get nothing pertained in anguish, nothing for mental suffering, nothing for loss of companionship, nothing for loss of _____, ah but you will give her a new garage door opener.

Jim R _____ No what we're saying is this has no business being under the DTPA because there are so many absolutely good remedies out there under strict liability for negligence which will provide every single thing that you itemized and you don't and you shouldn't be doing it under a consumer application of how damaging the DTPA is at least to my industry. First I'm Jim R _____, I'm president of Turner, I'm also chairman of the Tort Reform Task Force of the Greater Houston Partnership and as such we advocate strong modifications to the Deceptive Trade Practices Act for all the reasons that I've listened to you discuss. Representative Turner points out correctly and adequately that in order to have a true consumer protection act it must do three things. It must unbalance the playing field in favor of the consumer. If you're going to have somebody who bought a TV that doesn't work and they're going to file an action against the RCA Corporation, they've got to have some advantage. They have to have an unbalanced playing field to have any chance of success. Two the bill must impose the standard of perfection. You can't have the consumer argue that the toaster worked kinda, didn't work kinda, it either worked or didn't work, it either worked right or it didn't work and if the consumer says it didn't work right then you have to accept their pronouncement that it didn't work right, it's the standard of perfection. And third in order to make the law work as Representative Turner points out it must be punitive. You must punish that big company for not moving up and taking care of the problem that Representative Danburg says is the Marvin's _____ approach to it. We're going to punish you so you've got to

get up and you gotta take care of that and that is good protection. That is good consumer protection law and as a member of the Greater Houston Partnership, it endorses that type of consumer protection law. But let me describe you the problem. The problem is we take that law and we apply it in the engineering profession as an example. We will negotiate a contract to do a \$75,000,000,000 water treatment plant for the City of Houston. The contract will be that thick. We will pay very expensive lawyers a lot of money to help negotiate that contract which dictate how much effort we will apply, how much resource we will apply, what technology we will apply. What exchange we will have with the City of Houston's staff who has a very confident staff. They have a 100 lawyers in the legal department. They have 200 engineers in the Department of Public Works and we will negotiate that contract that says here is what we're going to do, here's how long it's going to take us to do it, here's what it's going to be, so on and so forth. We will then go through and design that plan and take two years to do that. We will work on the construction phase services and take four years to build that big hugh plant and at the end of that if something isn't perfect and that contractor files a lawsuit against the City, the correct legal advice for the City attorney to give the City is don't worry, whatever you end up having to pay that contractor, you will collect from your engineer under the Deceptive Trade Practices Act. It is the unbalance playing field, it is the standard of perfection and don't worry you'll collect three times it. Because that engineer did that design knowingly. They knew they were designing that. They were not asleep when that designed that plant. That's what the word knowingly means. The word knowingly means you were awake when you did it under the Deceptive Trade Practice Act. I know we had the idea that you didn't know you were defrauding something of course that's the intent of it but the way it currently reads, it just means you were awake when you did it. Now that deceptive trade practices bill doesn't belong in that issue. That causes the contractor to file a claim. That causes the City attorney to say separate forget right and wrong, we aren't going to worry about right and wrong, separate that contract, we aren't even going to bring that contract up, it no longer applies. Whatever you negotiated in that contract is not germane to this dispute. We're going to do it as though it was a consumer so you bought a toaster, not a \$75,000,000,000 water treatment plant. They can sue me under breach of contract, they can sue me under breach of warranty, they can sue me for negligence, they can sue me for malpractice, they have all these other remedies that they can come after me and they list them because that looks honorable, then right at the end they say and we're going to sue you under the Deceptive Trade Practice Act. Then my attorney tells me you have no defenses, you have no common-law defenses to this, they're suing you for punitive damages and your insurance carrier tells you you aren't insured. In other words they're suing you for your business and if you are a foolish enough business manager to go onto the courthouse on

that and lose that, you have put your 450 employees out of work. The law doesn't work when it gets to complicated business transactions of that type. That's what the consulting engineer's counsel wants relief from, that's what the Greater Houston Partnership is seeking relief from, the law corrupts the system. We have made it easier in Texas to redistribute wealth, then we have to create wealth. And the business that goes on in Texas now days is just let's redistribute it and those who work in the business of creating it are getting crushed out and the trial lawyers are into their sit corners and we need some relief. We need your help to call it off to put it back on a level playing field when we get into our areas and that's what we're looking for. I know we can go over all sorts of _____ but as I heard all your examples of how does this fit into the law, you always brought it back to some consumer law. Some consumer transaction and we need a DTPA consumer act for those transactions. For the guys who bought the tractor, I would hope they first go to John Dear and ask if they'll honor the warranty, probably will but if they don't, they probably need a DTPA. If it's green carpet and you want it blue, probably need a DTPA, if it's a wastewater treatment plant, \$75,000,000,000, we don't need the DTPA to decide who did what to whom and who owes who what duty. We have contracts, we have all sorts of standards to measure that performance by and that's what we need the relief from, that DTPA just corrupts the system so badly, you don't separate right and wrong, you never pursue right and wrong but that's the hope the engineers have to Greater Houston Partnership and we would appreciate any assistance you can give us and we certainly do understand how complicated, how important it is that you draw that line, bracket the transactions that are covered by carefully bracket more importantly exclude those transactions that don't belong in their and get us into just regular common-law and let us be prosecuted and judged by those standards. Thank you very much Mr. _____.

Yeah, wait a second, well Jim we've had this discussion many times...

Jim Yes...

And I agree with much of what you say ah and you want to just make that distinction of the small consumer or small business somewhere where we can bracket it down but when you have big guys paying a lot of money to lawyers who have negotiating contract on the market and the other side has confident legal advice and everybody is up here in the bit leagues, then leave them up their a knot on this unleveled playing field that we give to the consumer down here. Is that right?

Jim What we want to do is say a deal is a deal and you live by your word.

Okay, but...

Jim And that's how you should....

And you sue on the contract...

Jim And you sue on the contract...

What's that breakpoint, what do you think?

Jim We've looked at a lot of ways to try and help the lawyers figure out how to bracket this and there are people working constructively on this and going over the same areas of how do we define this. One of them is that they impose if you have more than \$25 million in assets back in '79, they said you can't use this. Although they buy typewriters that break, just like somebody else buys a typewriter but they don't care if you say that you have more than \$25 million you don't get to use it. I've heard this suggestion that if you're trying to recover more than \$500,000 that is not a consumer transaction. That's not carpet, you're into something complicated and you should have been paying attention to what you were doing, you should have had a contract for what you're doing, you should have gotten a warranty for what you're doing. So there's some dollar amount, if it's not \$500,000 make it a million. If it's not a million make it two million make it some number that if your seeking that much in damages you can't use the DTPA. If the cost of the services you were buying, if you were spending \$25,000 on services then you should have a contract with that person and you should measure that person by how they perform under that contract so maybe that's _____ the _____ the DTPA.

Why wasn't your contract with the governmental entity why didn't you'll contractually waive the application of the DTPA?

Jim That means you go to the City attorney, find fellow ah and you say we want you to sign this thing that says you're waiving the law of the land but the wisdom of this Senate {more than one person talking--can't understand} and you can't do it. As a matter of public policy you can't say that the legislature gave that law but don't worry city counsel I'm _____ it away. _____ not going to do it. That's right.

I have a bill dealing with contractual venue that I'm _____ on behalf of the Texas Business Law Foundation and it has in there \$500,000 as the line which I thought was reasonable until we got into the committee last week and someone suggested that before repairs, construction, repairs at their homes, they can often go over a half a million dollars and I thought that was a pretty reasonable suit. We started looking it over, a half a million dollars but I think there ought to be a number that you start to feel like the transaction is a sophisticated transactions.

Jim We engineers have looked at that and said well maybe you say it's \$500,000,000, except for residential construction,...

Yeah.

Jim I know there's a little heartburn about letting lawyers out of the DTPA, no offense to my good lawyer friends but we can say professionals, except lawyers, and get on down the road. And they want to sue each other anyway cause that's where all the money is now. They've gotten about all the money out of the engineering committee, they're going to get after themselves here pretty soon.

You were doing real good Jim don't press it. You're doing real good. Ah Representative Hartford has a question.

Thank you. Let me just make sure I'm clear Jim on what you do. Under that sort of an approach I can't envision an transaction but let's say I could envision a transaction where I hired you to do something for me on a personal basis, do some kind of engineering around my house...

Jim Driveway is the example we'll use...

What's that...

Jim Driveway, you want to build a driveway so you got to _____ do your driveway.

When I hire you to design my driveway or to make sure that you don't run through West University that places sewer interceptive that runs under my sidewalk. Ah you wouldn't have a problem there? Being under DTPA, under that kind of a transaction even though you're a professional, even though you're an engineer.

Jim For that kind of transaction it could it would be appropriate for an non-informed residential owner for his home use needs a driveway and doesn't know what kind of permits you need and doesn't know what to do about the drainage and hires an engineering firm to say what do I got to do. That to me is a consumer transaction.

Even though you're one of the organizations, you pay the licensing fee and you pay the extra revenue fee and the whole bit. That's still okay with you.

Jim Yeah. And I'm trying to find a way to bracket it, yeah. There seems to me there a size of transaction that we did in two where the "consumer stops becoming the victim consumer and starts becoming the sophisticated purchaser of goods and services or should be a

sophisticated purchaser of goods and services. Yeah there seems to me they'll be some line in there.

Thank you.

What if you exempt out governmental entities?

Jim I think there are governmental entities that when they get below 10,000 in population that they probably need deserve the right to use the DTPA. There are some population over there.

Right.

Where though when you get over a certain number, hell they'll hire Vinson & Elkins to represent them. They've got great lawyers. They've got a Department of Public Works. They use federal standards. A lot of this work he does comes _____ from federal standards and they say you'll do it this way and it's approved by _____ and you'll do it get paid that much to do and this is the form of contract you'll have. That happens in communities with 25,000.

Turner Right, that's what I'm saying, I mean they're ah the example that you cite I mean it's a very persuasive one but I'm just wondering is trying to craft the bill to deal with those types of examples which I agree with you merit a response unless _____ response as oppose of crafting something so broad with such a broad net that it just grabs everything within the net.

Jim I think you're right Representative Turner and I know that the lawyers and Joe Longly and Carl ??? Martin and all the others and Mr. York are trying to trash that out but that is I guess what we look to you legislators to make sure they do that with some degree of reasonableness.

Turner We appreciate it.

Jim There is death on the line.

Danburg Jim everything that you're saying I think is really on target I mean the examples you're giving I think we all agree with. You are aware that the bill does a lot of things other than what you're addressing?

Jim Yes I am.

Danburg Okay. You are also aware that it has been presented to the public that we either agree with everything that we are presented in the 11 points for reanti-business?

Jim I hope that the news media could do a better job of explaining. I think its that are 11 areas that need addressing. What exactly is done to the DTPA is up to good thoughtful people figuring out how to make sure it stays a strong consumer protection bill cause you need that in the State to attract the businesses we want here, to have the right business atmosphere we want but at the same time it just doesn't run a market it doesn't become the plaintiff's lawyer's lunch box.

Danburg Well yeah you know I've voted for dozens of tort reform bills in my zillion years on this committee and I hope that this one gets to the point where it is fair and I can vote for it. But this attitude that you're either for everything that we bring to you or you're anti-business is just really getting on my nerves.

Jim I think there's a lot of us represent Danburg will understand the sausage making process is a process that all bills need to go through. We're here to lend our advice and support but it is the lawyers start putting in the commas and the semi-colons and we engineers just hope that it comes out to be some reasonable standard we _____. Thank you very much.

Thanks Jim.

Mr. _____ if I could just echo what she said. I found you're testimony to be the reasonable and persuasive. Thank you very much.

May I ask at this time Mr. Randall Birdwell.

Hold on one second _____.

I'm sorry.

I'm going to have to call someone out of order and we're going to come right back. Mark Alan Owens. Mark is representing the handicapped community, let me call him up and Mark is testifying against HB 668.

Mark First of all I wanted to thank you'll very much for giving us the opportunity to speak on behalf of myself and other handicapped individuals. In particular I feel like the handicapped community is particularly susceptible to Deceptive Trade Practices for many reasons due to either hearing impairments, _____, a feeling in the business community that we can be taken advantage of. My particular story I would like to share with you, I contracted for a trip to Mexico and I specifically outlined the accommodations I would need on my trip specifically bathroom accommodations. These were promised to me repeatedly and I wanted to make sure I would have these and I reiterated them. I gave them specifications of my wheelchair, what I

would need in the handicapped bathroom, everything that I would need and told them outright I would not go on this vacation were these not guaranteed to me. When I got there needless to say they didn't know who I was, I had to go to the embarrassment of in order to use the bathroom facilities transferring on to a hard marble floor, slighting on the ground, not feeling below my waist, I was lacerating my tissue, I ended up getting an injury that the wounds were exposed my tailbone, I have pictures if you'll like to see them. I underwent three surgeries, I lost my potential for job advancement, I lost my wife, my marriage because she became my nurse and I became instead of a handicapped person who was self sustainable a depended. The people now want to claim hey let's past the buck you know. I talked to the person one time it would be I just got off the phone there won't be any problems with the accommodations, yes there's a handicapped facility and if you pay for an upgrade we can sit you up there. Repeatedly lied to over and over and over again. Merely to get the sale. And as you expressed earlier Senator ??? Turner, am I going to be able to go after these people easier now or am I going to have less of a recovery. I have no, my understanding of this bill as it's proposed, I don't have any mental anguish compensation avenues on the DTPA if this bill is passed if my understanding is correct.

It's correct.

Mark

It's correct. I would like to submit these photographs to you. The top one there is after one of the surgeries that tried to heal the laceration as a result of scraping on the floor to try to use the bathroom. Was unsuccessful. And they tried to closure. The second time they tried 40 hyperbarics treatments, I don't know if you're familiar with what hyperbarics is but you only go on a hyperbaric chamber if you have the bends or you have a non-healing wound. It's like going inside a little bank volt teller dispenser that leaves you almost no room to move your arms, it's very claustrophobic and it's created a lot of pressure on the ears. That was 40 of those and they're about a \$1,000 a piece. I have since wrecked up approximately \$200,000 of medical bills. Lost my marriage, the physical, I'm set back on my rehabilitation and I just think it would be a crime if this bill were to be passed especially to those in the handicapped community and would strongly urge the committee not to weaken the strength of the Deceptive Trade Practices Act.

Thank you Mark. Are there any questions for Mark? On behalf of the committee, let me thank you for sticking around with us and being patient with the committee and I know it's gotten real late. We appreciate your testimony and certainly we'll take it give it every due consideration.

Mark

Thank you very much.

Thank you. At this time we're going to call on Wade Spillman. Is Wade still here?

Wade Right here.

Wade is representing the Texas Association of Insurance Agents testifying for the bill.

Wade Mr. Chairman and members of the committee, my name is Wade Spillman. I'm an attorney here in Austin. I'm with the firm of McGinnis, Lochridge & Kilgore. I represent the Texas Association of Insurance Agents. I'm especially happy for the opportunity to talk to you a little bit about the interaction between the DTPA and 2121 of the Insurance Code. As of course, you know both the DTPA was inactive in 1973 as it's been stated here. Amended many times over the years and at the same time in 1973 the Article 2121 which had been adopted in 1951 was amended to provide a private cause of action separately and 2121 which made relief available to injured parties in private cause of action if you please under 2121. At the same time the DTPA including Section 1750 was inactive. That section is entitled to relief for consumers. So you had correspondent, private causes of actions, one in the DTPA, one in Article 2121. Incidentally, the insurance industry is subject both to Article 2121 as the private cause of action created in '73 for folks in the business of insurance and of course they're also subject to the provisions of Section 1750 of the DTPA. Now interestingly enough over the years those sections have not state the same, that is identical with each other. For example, in the thing that prompts us to be here today is not to ask for to be exempted from the Act in any respect and we don't intent nor recommend that you repeal us Article 2121 of the Insurance Code. What we're interested in is being treated the same way with reference to the measure of damage that the people are unbitter on the subject to the DTPA. Now isn't that interesting? We want to be made subject to those provisions. Others want to be exempted from them and I understand their arguments and I share their judgment about their desire to be exempted but the thing that concerns us protectively is that under Article 2121 of the Insurance Code and especially Section 16 thereof which bill it provides for the relief available to injured parties. We are subject to automatic trivially, automatic trivially, not trivially as in the DTPA based on the decision of the triar to fact but rather if we are found to be involved in a knowing violation which incidently as one of the speakers has indicated the course of said if you're not asleep in the middle of the night and you did an act, you did it knowingly and of course those if you're subject to the 2121 Section 14 thereof as anybody in the business of insurance is then it's automatic privily. I think one of the most interest things I've read in a long time and I've practice law for 45 years, it is a decision that came out of the El Paso Court in which the judge who wrote the majority opinion also wrote a

descend if you please. In the descend he in effect said all the jury had to find was that the defendant in that case knowingly committed the act. A finding which would be pretty much automatic unless the jury could reasonably include that Hart did not know what he was saying, the defendant.

What was the conduct Wade?

Wade I'm sorry.

What was the conduct?

Wade The conduct in that case was an insurance case where the argument was how much the coverage was to be. There was a policy of insurance written...

And how much was the policy for?

Wade Several hundred thousand dollars, on a home...

Okay

Wade Well actually it was on a business, it burned down. The question was whether or not the plaintiff or the defendant was telling the truth about the effort to get additional coverage. They wrote a policy, the question was did they say they were going to get additional coverage or did they say they were going to try to get additional coverage, that was the...

The agent...

Wade Yes, it was an agent in that case. Now...

There was a dispute of whether the agent was going to get more coverage...

Wade That's correct...

For the homeowner or not...

Wade That's...

And the homeowner would...

Wade _____ for the business owner.

The land owner. Alright.

Wade Right.

And the business owner says that the agent was going to get him more coverage and the agent said no I...

Wade Try to get it.

He was going to try to get it.

Wade Yeah, interestingly enough the...they found for the plaintiff. That the plaintiff knowingly engaged in the act, sold this coverage...

That the defendant or the plaintiff did?

Wade The defendant did, right.

Okay

Wade And that the, the question was once they found that he did this act then it was automatic travelling. Automatic travelling. In fact interestingly enough the judge in the descent, the same one that wrote the majority opinion said, it's interesting Representative _____ what this judge said. He said that the attorney of course did not, in fact he denied that he was asking for any punitive damages, he said that he was asking for the actual damages only. Well obviously the law requires the judge to travel it 2121. We say that's not fair and I think most people agree it's not. The question ought to be whether the triar of the fact decides that it's up to travelling as in the Deceptive Trade Practice Act. All we're saying and incidently all we're doing in this act, we're not trying to repeal Article 2121, we're trying to say look we're repealing the private cause of actions section and several other sections which I'll quickly tell you what they are in Article 2121. We want to be over under the Deceptive Trade Practice private cause of actions provisions exclusively. We're not trying to escape it. We're saying that those, that's where we want to be. Alright, here's what they require for that to happen. You repeal Section 16 of Article 2121, we're already under Section 1750 of the Deceptive Trade Practice Act anyway, there's where we want to be because you have a fair measure of damages there, we're not trying to get out from any under anything, we're saying look the measure of damage and the damages ought to be determined are the same rules for us as anybody else up to travelling???

Is your only concern, is your only justification for messing around with 2121 under here is because of the automatic trouble damages.

Wade That's the primary thing that motivated us. There are other things here that are involved.

[Tape 2, Side A completely on breast-feeding]

[Tape 2, Side B]

(Representative Curtis Seidlits in the Chair)

JUNELL: ...the constructive notice aspect of the Public Records Doctrine is not applicable in the DTPA dispute. The DTPA ??? an act of intentional wrong doing. The DTPA allows the trier of fact to award additional discretionary punitive damages based a mere knowing standard. This standard is generally a lesser standard than that required to recover common law punitive damages or statutory punitive damages under the 1987 Tort Reform Act. Even though the Texas Common Law does not allow the recovery of punitive damages for mere breach of contract, a DTPA consumer can recover additional discretionary punitive damages for contract, which is nothing more than a mere breach of contract. DTPA liability may be imposed without privity of contract upon third parties in what is in essence a contractual dispute. Because the DTPA treats contract disputes as if they are tort actions, the DTPA imposes liabilities on employees, officers, representatives, and others involved in the contractual process without regard to the rules regarding ??? corporate veil and rule that an agent acting for a disclosed principal is not liable for the principal's contractual obligations. The DTPA vitiates most of the historic legal doctrines developed over the years which either function to or allow businessmen to allocate the risk of loss among themselves in any fashion other than is dictated by the DTPA. In 1989, the legislature amended the DTPA to apply the joint liability comparative responsibility, credit for settlement and contribution concepts of the 1987 Tort Reform Act to a very small segment of the claims brought by consumers of the DTPA. Claims for damages, for death, personal injury other than mental anguish or distress associated with the violation of the DTPA that does not involve death or bodily injury, and damage to property other than goods acquired by purchase or lease that is involved in the consumers claim, but that damages arise out of that occurrence. But those concepts of comparative responsibility, joint liability, credit for settlement and contribution are expressly limited to those few types of DTPA. Contractual provisions such as disclaiming duties providing that the goods were sold as is, limiting liability, requiring condition for liability such as notice plus an opportunity cure, and the like have been consistently declared invalid in connection with the DTPA claim, even in situations where such provisions were freely and fairly bargained for and willingly accepted by the consumer in order to obtain a reduction in the purchase price. Texas courts have held that although the DTPA is penal in nature, creates a liability unknown at the common law, and deprives businessmen of common law rights, is to be broadly and liberally construed in favor of the consumer. The DTPA has been judicially interpreted such that if a specific exemption for an act or practice does not appear in the DTPA, this indicates that the legislature intended not to exempt the act or practice from the coverage of the act. These policies and concepts are so radical, extensive, and potent, that the DTPA effectively subsumes existing Texas system of contract law and tort law.

I'm glad somebody wrote that for me. Don't ask me any question about what I just read, all right? Let me bring you up-to-date, Mr. Chairman. Since this bill was filed in the Senate by Senator Bivins and myself in the House, Senator Bivins and Todd Hunter, Bob Duncan and myself intermittently -- I've not been very involved since we started markup of the Appropriations Act -- have been meeting to try to narrow what the questions are that we can agree on. There are a number of things I will tell you, and I believe some of the witnesses who will come--Joe Longley has been involved on behalf of the trial lawyers. Clark Martin, who cannot be with us today, from Vincent Elkins in Houston, has been involved for business on this issue. There have been a large number of issues that have been, or at least some number of issues that have been narrowed. This bill does not represent the status of those discussions. And obviously those discussions are not binding on this committee, nor are they binding on the House. It has been an attempt to try to find those issues in which commonality can be reached and in which something can be presented to this committee and ultimately to the House to say "Here are things we agree need to be changed, and some direction for that."

Most of these, my understanding is, involve such things as mediation. And so you are going to see some things in this committee substitute that probably do not reflect the status of where I

think the bill that I would like to ultimately present to the committee or the subcommittee for passage. There are some things that I will tell you that are in the committee substitute that are pretty controversial. Limitation of professional liability obviously is something I don't think is going to be resolved, in my opinion, perhaps, between that. It is provided in this bill that professionals are exempted if they are covered by an errors and omissions insurance or have paid into a recovery fund. It applies to people considered vicariously responsible for a service provider's action.

WOLENS: Would you have any minimum amount statutorily required for an errors and omission policy, or would you just say any old policy--

JUNELL: I think that's a good point, Steve. Right now my understanding is that there is not an amount contained in the bill, and that needs to be--

WOLENS: Is that something that you think would be good?

JUNELL: I think it probably would be, but there needs to be a minimum amount. Because obviously if you have a \$5,000 errors and omissions policy, it is a way to get around what the issue of having errors and omissions insurance.

WOLENS: So we would then not require an E&O policy of any particular amount, but by an entity getting it, they would buy themselves out of the DTPA.

JUNELL: That's right. And basically this-- let me kind of go through the list, this summary list. Basically what this bill does is that a person may waive rights under the DTPA if represented by counsel, as long as that counsel was not represented. And what we are trying to get at-- it is not the problem with the person with the toaster or even the problem with the automobile. The problem in many cases has been with the DTPA and perhaps in its use. It's sophisticated business people who are represented by counsel who the deal goes wrong from one side or the other, now using that as a hammer on people. So under this committee substitute-- no, this is a business bill.

WOLENS: As far as what I understand as the problem has been, as you have listed there, Rob, and others have given it to me, is that this has gone outside of the consumer transaction and progressed into big business where big boy is suing big boy. And they use it as the hammer.

JUNELL: I think that if you look at one segment of people that are interested in this bill, I think that's true. There are other people-- I'll give you an example, real estate people. Most realtors don't--you know, the majority of the homes they sell, I would think are in the \$100,000 range average, you know on either side of that. So obviously they're interested in this bill. This bill does provide remedies for consumers in transactions not larger than \$500,000. So that if your transaction involved 600,000 or 700,000 or five million, obviously you have persons in there that-- you're not looking at your ordinary consumer. There's a definition of consumer in this. It strikes partnership or corporation. It limits this, and I will say this is one of these areas that needs to be discussed.

WOLENS: Well, with limited liability partnership and other...

JUNELL: Exactly right.

WOLENS: ...types of business entities, I can just shield myself by changing the identification of my business.

JUNELL: And so that definition of consumer is one that needs to be-- I think it's one in which there is obviously conflict in that particular. The question of the insurance codes, Section 21.21 and its relationship. You know, you have a cause of action under the insurance code for unfair insurance practices. There's also provision in the Deceptive Trade Practices Act that you have-- which do you do? Do you multiply those issues? And we'll have someone come up and discuss the mechanics of that work. The definition of what economic loss is and whether or not

someone-- and the definition here is pecuniary loss as opposed to mental anguish. I think this is one of those areas in which-- take it out of wrongful death, personal injury, but you go into a business deal. Someone may be upset about it, but is there mental anguish and should there be a recovery of the trebling of damages for mental anguish in that situation without physical injury being involved? There is a change in the application of the knowingly standard and, or intentionally for the punitive damages aspects. Again, I think one of the biggest portions is that this bill does not apply to professional service. If the individual finds the service is covered by malpractice or errors and omissions insurance or has paid into a recovery fund-- And I'll give you an example. Someone comes to an attorney, for instance, for professional advice on writing a will. They write the will. The will doesn't turn out the way it should have been. There is a cause of action for legal malpractice. Should it also be a deceptive trade practice? Someone goes to an accountant. They say, "Here is the situation. You do an audit of our business. You render an opinion." There is a cause of action for the negligence of that accountant. Should there also be an additional cause of action for deceptive trade practice? A lot of what these have come out of is that you have multiple remedies. And if you provide a professional advice, it's couched in terms in this bill of persons who are listed to pay the professional tax under Article 10. These include-- of course medical doctors are already out by their own practice act; medical doctors are out. Dentists, optometrists, chiropractors, psychologists, CPAs, architects, engineers, attorneys, real estate brokers, security dealers, and veterinarians because they all pay the \$200 professional fee. I'll be glad to call on you, but it's not my committee, Ms. Danburg.

SEIDLITS: We were just discussing auctioneers. We had them in here earlier.

JUNELL: Well I think its a revenue enhancer for the State if you kind of said, "Look, if you pay \$10,000 a year to the State, you'd be exempted from DTPA."

SEIDLITS: Representative Danburg.

DANBURG: I mean there are some--speaking as an attorney to another attorney, there are some very attractive things about that. Tell me theoretically why you or I as attorneys hold to a lower standard of honesty in our dealings with people than a plumber or a ??? ???.

JUNELL: I think you go back, if you render a professional opinion, and I think whether this applies to attorneys or accountants or this other laundry list of people that you get, and I think that's the question.

WOLENS: But you're going beyond the professional opinion, and you are absolutely right. If the professional opinion is not accurate, then you can sue for negligence. You can sue for breach of an implied contract, but there a separate bit of conduct that you're forgetting about, and that is in the advertising. It's the deceptive trade practice which you have not discussed with us. Chiropractors, lawyers, you go through every one of these, and all you have to do is look at your TV Guide on a Sunday, and you'll see nothing but advertising from the same professionals that we're leaving out of here.

JUNELL: And Steve, you and I agree 1,000% on this professional advertising. I'm on the--

WOLENS: Except you're carrying the bill, and I'm not.

JUNELL: Well, would you like to co-author?

WOLENS: There is some difference with us right here.

JUNELL: And I agree with you. And I think that is an issue that needs to be-- if the cause of action is based upon a professional opinion. That's something then that perhaps this committee wants to exempt as opposed from. I represent myself as being a board certified in the state, or not even board certified. I represent myself as being able to do bankruptcies, and I've never done a bankruptcy in my life. And you show up and I mess up your bankruptcy, then it's based upon a representation that I have made.

WOLENS: And at that point, it seems that we're really making a mockery of the Deceptive Trade Practices Act. And you're making a mockery of it to the people that you're saying it was intended for, the little guys. It's the little guys that will often pick up the TV Guide and look at the advertising from a professional and follow that advertising, which is very often deceptive.

JUNELL: I don't think you'll hear any argument from me or any other supporters of this. It is based upon expressed advertisement or warranties. I don't think you'll hear any disagreement from anybody.

WOLENS: Now the way it is worded, though, it would exclude..

JUNELL: That's correct.

WOLENS: ..any deceptive trade practices for professionals.

JUNELL: That's right, and that's the reason I say these are some of the things that are still fluid and are still in motion and still trying to get resolved.

WOLENS: Now when you say it's fluid and in motion, tell me what you feel in your heart is good public policy. Does Rob Junell feel in his heart that there should continue to be a cause of action against professionals for deceptive trade practices, deception in the trade, deception in the marketing?

JUNELL: In the marketing, yes. I don't have any problem with the marketing aspect of it. Here's what I have a problem with. You and I both, all of us that are lawyers on this committee, have dealt with clients and say, "I'll take your case. I'll to my best," and I go do my best, and it's hard. Lawyers are not an easy group to defend anyway.

WOLENS: But your bill defends them, so that's why I wanted to ask about lawyers.

JUNELL: But I'm saying, if you take some of the other groups. Let's take a group, for instance, like CPAs. You have someone who says I need some tax advice. And you say, "Good. Here's my tax advice." The tax advice is wrong. Have they committed a deceptive trade practice or have they committed professional negligence?

WOLENS: You are right about that, but there is an enormous amount of advertising that goes on by the CPAs, too. And I understand, but I am drawing a distinction between the conduct itself and the marketing. There is a difference between the two.

JUNELL: You and I probably agree on that. I'm just not able to articulate how it should be placed out in here.

WOLENS: But you believe that there should be a distinction drawn in the bill.

JUNELL: I don't have any problem with that at all.

WOLENS: Now, you have mentioned the CPAs, and we have discussed the lawyers. Discuss with me an honest group of folks, the health care providers. Now in this bill, you would say that all health care providers-- put it a different way, insurance companies. You'd say that insurance companies--

JUNELL: Insurance is not covered here.

WOLENS: Is not covered here?

JUNELL: Insurance is not covered because they don't pay the professional tax.

WOLENS: So, the deceptive trade practices will not affect 21.21?

JUNELL: The bill, I think, affects 21.21, but insurance agents themselves are not excluded from that.

WOLENS: I want to discuss 21.21.

JUNELL: I'm probably not the person to discuss it. I'll have somebody up here to discuss that with you, if I could, Steve.

WOLENS: Without doing it specifically, just tell me generally.

JUNELL: I can't.

WOLENS: All right. All right.

JUNELL: And let me tell you why. I worked on punitives in joint and several-- and started the DTPA and we started markup, and so I have not been involved in any of the discussions.

WOLENS: Of the people who are here to testify on why 21.21 should come out of DTPA, who do you think is the most articulate to discuss it from a policy point of view?

JUNELL: I'll tell you who's here. That may be better. Scott Sheehan [?] is here from the Business Law Foundation, and that's who I'd rather rely on. And if he says it's somebody else then I'll let somebody else.

WOLENS: Yeah, that's fine. Somebody else.

JUNELL: You all have the list. What I'd rather do is turn this over-- there is a problem with the Deceptive Trade Practices Act in my opinion on how it's being implemented under law right now. That's the purpose of this bill. Again, there have been discussions. Joe Longley's been involved and others have been involved in trying to resolve some of those differences and trying to get some common ground. And then to lay out for the committee and the subcommittee those areas in which there can't be agreement on. I would like to call at this time Scott Sheehan from the Business Law Foundation. There's a number of other witnesses that I'm sure that will be here as well, but Scott.

SEIDLITS: Rob, Ashley Smith. Is Ashley Smith present? Ashley?

JUNELL: He doesn't have his hearing aide in today.

SEIDLITS: Did you want to present or ask Rob to present some witnesses in a panel format? Was that your request?

SMITH: Mr. Chairman, no, we would like to do that. I have submitted a list in ??? committee, and we have asked that with ??? ??? commenting on the legal aspects of it that they hold the testimony down to three minutes.

SEIDLITS: OK. Rob, you're the author. Who do you want first? Scott Sheehan?

JUNELL: I think Scott would probably be the best person to ask some of the technical questions that Steve had.

SEIDLITS: Then just tell us who you want next.

JUNELL: Let me tell you, Clark Martin was supposed to be here. Clark has had some illness in the family today, and that's one of the reasons he couldn't be here. He's been one that's been

involved in some of these negotiations and meetings. So I think Scott would probably be the next--

SMITH: Mr. Chairman, if I might also offer. Richard [not audible]

JUNELL: Can you get both of them up here, Mr. Chairman?

SEIDLITS: You handle it however you want, Rob.

JUNELL: I think it really would be helpful to have both of them, because it is a pretty sweeping bill and I think you might get, instead of having to wait for it.

SEIDLITS: I would ask that whoever is going to testify on this bill to try to keep your testimony on a factual basis, and try to tie in your assertions to some type of specific situation where you know of a harm coming to a Texan or to the Texan economy. In other words, tie it in to everyday practices of business, and keep in mind the overriding concern as to whether or not it is good public policy for Texans and for this legislature and this committee to change the way we handle consumer transactions in this state. If you would, since the law is sitting out there and you all are trying to change our mind, I would look upon those that are in favor of the bill as the proponents of the bill. We've heard a lot of talk about clear and convincing evidence, preponderance of the evidence, and other standards or burdens of proof. I tend to look at changing the law as a little bit higher standard than preponderance of the evidence. So if you would, talk to us in terms of presenting your factual evidence on the basis of clear and convincing since we've talked about that in the punitive damages bill. Be sure and talk about it in light of does this do-- what does it do for a Texas consumer? What does it do for Texas small business? What's the reasoning behind why we should change the public policy in this area? If you would identify yourself and who you represent, that would be most helpful.

SHEEHAN: My name is Scott Sheehan. I'm a Houston attorney. I've been practicing there since 1976. I'm a member and Director of the Texas Business Law Foundation, which is a nonprofit association here in Texas. So I am with both small and large corporate members as well as large law firms and small law firm members. I think I'm with the smallest law firm in the foundation. I'm not sure if that's good or bad, but I am. The name of my firm is Schroder, Gloffland and Sheehan [?] in Houston. I might add I'm the former chairman of the Consumer Law Section of the State Bar, as well as a member of the Business Law Council of the State Bar. In fact, I consider Joe Longley and Bill Maxwell and David Bragg and Mike Curry and others as friends, although I'm not sure they'll agree with my testimony here today. That's my background. I might add, too, I really have spent a lot of time over the years with deceptive trade practice statutes. I had the good fortune as a young lawyer as early as 1977 to give the first major institute talk in Houston about this statute. I've done a lot of consumer law compliance work. I spent a lot of my practice representing businesses and helping them comply with this statute, the Credit Code, the Federal Truth in Lending Act, Equal Credit Opportunity Act. To me it is one large body of law which I call consumer law. I've seen this area of law develop in the last 20 years. I think that by and large it's been a good area of law. And I think a lot of what this session is about as I understand it, is an opportunity to really look and see what we have learned as a state in the past 20 years with this statute as well as others, and look at the issues of fairness and look at how to perhaps get some more balance within the law. So I'm not here to tell you that the DTPA is a bad law. I don't think it is. I think it's one that I've always felt could be improved, it can be enhanced. I think it's something that's been a good ??? to Texas, and I hope we can improve it. That's what I will be here to try to convince you today.

SEIDLITS: So, you're representing the Texas Business Law Foundation?

SHEEHAN: Yes, sir. And I'm here as a volunteer. I understand that I am sworn to tell the truth?

SEIDLITS: Yeah. You have to fill out your witness affirmation. Richard?

JOSEPHSON: Yes.

SEIDLITS: You want to tell us who you are and who you represent?

JOSEPHSON: I am Richard Josephson. I practice law in Houston with the law firm of Baker & Botts. I have a trial practice. I have grown up under the Deceptive Trade Practice Act. It was enacted right after I started practicing law, and I have had to practice under it for some 22 years, and have had the opportunity to experience, in terms of where it started, what it was originally intended to do, and what I believe it has become. I am here as a practicing trial lawyer and member of the Bar because I believe that the statute, while still having a purpose under Texas law and still a need, has to have some serious reforms because of how it's been used and what it's been used for as a substitute for the underlying common law and other statutory remedies that Texas law has afforded. It's basically taken over all of the other common law remedies and statutory remedies as a means of finding an easier way to find liability against defendants in a whole variety of settings for which I believe this act was never intended to apply. Particularly products liability and other areas which I would like to discuss.

SEIDLITS: And who do you represent here today?

JOSEPHSON: The Texans for Lawsuit Reform group. We basically have a number of witnesses who have asked to testify before this committee who represent different areas of specialty in practice in their professional societies and professional associations. Before calling upon them to come up and testify, what I would like to do if I might, for just a moment put in context some of the reforms as we see them and why we believe they're necessary. We'll be brief, but it might help the committee in terms of seeing where the other witnesses who come to testify fit in in this process. If I might, with the Chairman's indulgence, just take about a minute in order to do that. It might help some if that's the format that you would like us to pursue.

SEIDLITS: Let me tell you-- did Rob have to leave?

JUNELL: I'm right here.

SEIDLITS: I didn't know we could block you out back there. Do you have witnesses that are going to talk about the economic impact on Texas? OK.

JUNELL: Mr. Wolens asked some technical questions, and these fellows are much more [not audible]

SHEEHAN: I'll just follow the Chairman's lead, so I don't mind waiting.

JUNELL: Yes, there are some witnesses who can testify as to that.

SEIDLITS: That's all right. We can go ahead and ask the questions. There seems to me under the bill there's a distinction, or we're attempting to make a distinction, between professionals and whoever else gets sued under this act or takes advantage of the act as a claimant or a plaintiff. And I know there's a lot of associations. I saw some engineers and accountants and all those folks who are here.

JUNELL: They all want to pay taxes now, because the substitute provides that if they're taxed--

SEIDLITS: That's right. Whoever comes under that \$200 deal, or whatever it is--

JUNELL: I think Scott can speak to that as well as--

SEIDLITS: OK, I'm more interested in those people outside that area that may be-- that these gentlemen may defend and he mentioned products cases. In other words, other people. But go ahead and tell us your background, and we'll go.

JOSEPHSON: From my viewpoint, the Act as it was announced and debated back in 1973 was in large part to afford an easy means, almost a strict liability standard, to right egregious consumer wrongs that occurred. We heard specific examples, and I can remember these, of the person who came around and sold the dancing lessons to the lady and took her life savings. The person who turned the odometer back. It should have said 120,000 miles, and it said 20,000 miles. The aluminum siding salesman who went from door to door and built the public. I mean these were the kinds of examples and the situations where it was indicated that this Act would apply, including having the right to the Attorney General of this state to enforce actions to protect the consumers. I don't think anybody here is seriously contending that those are not proper means or that this isn't a proper statute or that its purpose wasn't good to try to accomplish that. What happened was, because the language was so loosely written and the laundry list of violations that's found in the Act could be applied to anything, that it wasn't long before very creative people began to decide that this Act could apply to virtually every kind of conduct. It could apply to malpractice cases. It could apply to products liability cases. It could apply to virtually anything. And they decided, because of interpretations of the courts and their own views that this Act would then serve in place of or along with the other more traditional remedies that we have in Texas, such as negligence or the other common-- or products liability law or the Texas Securities Act or the medical malpractice laws, or any of the other laws that we have. This began to assume an identity and life of its own, and I don't believe that it was originally intended to serve such a life.

SEIDLITS: Representative Turner has a question.

TURNER: Rich, I just want to ask you one quick question before you get too far along. With respect to the examples that you've cited, is there anything in this bill that would affect the recovery of those individuals, or make it harder for them to recover?

JOSEPHSON: I don't believe so. In addition to that, they have their traditional-- in addition, the consumer still has his traditional-- he or she have their traditional causes of action for remedies in addition to the DTPA which they can pursue.

TURNER: Is the burden greater under this bill? I just want to stick with the examples that you've cited that we all agree with and that you agree with, and that those individuals should have a right to recover under deceptive trade. I just want to know with respect to what you're putting in the bill, the intentional portion for example. Does that make it harder for those individuals to recover under this bill?

JOSEPHSON: It does if they're seeking punitive damages.

TURNER: OK.

JOSEPHSON: You see, it's a different standard than "knowingly" that we have now.

TURNER: I understand what you're saying. I just want to use your examples. Those are the impacted individuals that should be allowed to recover, correct?

JOSEPHSON: Sure.

TURNER: And with respect to those examples that came into existence when Deceptive Trade came into existence, you have no problems with the way the bill was intended at that time for those examples?

JOSEPHSON: Yes, except that the standard was written terms of strict liability.

TURNER: I understand that. I just--

JOSEPHSON: If a person was innocent. For instance, if I sold these services, and I was totally innocent and had no intention of defrauding the person, but something went wrong, then I'm automatically liable under the statute as it has been currently set up.

TURNER: I understand that. I just want to make sure. I want to take the examples you cited, that you believe those individuals should have a right to recover under Deceptive Trade. And if we just focus on those examples, you would not be coming forth advocating a change of the law, if we were sticking with those specific examples, right?

JOSEPHSON: That's true.

TURNER: So what I want to ask you, are you advocating changes in the law that would make it more difficult for those individuals that you cited in your example to recover? For example, the intentional portion, the knowingly standard, the definition of economic damages as opposed to actual, will those individuals that you cited have a harder time to recover under this particular bill?

JOSEPHSON: I don't believe they will, because the cases I cited are so egregious that I don't believe they'd have had a difficult time recovering under fraud, which is a much harder standard. I don't believe that they-- there are five causes of action I can think of that currently exist under Texas law that would protect those people. I don't think they'd have a harder time recovering.

TURNER: I understand that. I'm not so much concerned about the other areas of the law. I'm talking specifically about the Deceptive Trade Practice.

JOSEPHSON: Right.

TURNER: You will agree with me, though, that they will have to prove that their burden of proof will be a little bit higher under this bill as compared to the Deceptive Trade as it presently stands. Is that a fair statement?

JOSEPHSON: Not for the basic violation, no. The laundry list would remain intact. It remains in this bill. It's the same laundry list.

TURNER: I understand that.

JOSEPHSON: Your 24 or 25 laundry list violations remains in this bill.

TURNER: Let me ask you this. With respect to what they might recover, utilizing the economic standard, would they recover less under this bill than they would recover under the present system?

JOSEPHSON: The bill was written to cover situations all the way up to \$500,000.

TURNER: I understand that, but if we're not dealing with a situation that would bring in 500,000, with respect to those specific examples that you've cited, would they recover less under this bill than they would under the present system?

JOSEPHSON: Same. Absolutely, because in the examples that I gave, the examples are economic loss up to \$500,000. That's what the current legislation prescribes. The old legislation says that it doesn't have a limit.

TURNER: It says actual.

JOSEPHSON: It says actual damages. It doesn't have a limit, and it has a provision for mental anguish, and that's what you're asking.

TURNER: So the point that I'm making; I want to make sure that we're not missing each other. Under the bill that you're advocating, the examples that you cite, the people in those examples could recover less under this bill than under the present system. That is a true statement, isn't it?

JOSEPHSON: Not in my view, but I'll let--

SEIDLITS: Representative Wolens has question.

WOLENS: Mr. Josephson is the kind of lawyer that I would like to represent me. He's very good. And I don't say that in a bad way. I see these guys over here shaking their heads, and I would wonder if you would please ask Mr. Longley to come up and just respond to that narrow issue, because I find Sylvester's question to be good. I'd like to know if there's a legal mind, perhaps as good as Mr. Josephson, who could respond and say whether as to those specific acts that Mr. Josephson thinks should be preserved and should continue to be protected under the Deceptive Trade Practices Act, if there will be any change in how those cases are handled if this bill passes as is. Would you please call Mr. Longley just to respond, perhaps, to that narrow question to Mr. Josephson?

SHEEHAN: Could I have a chance first, please?

SEIDLITS: Joe, have you filled out a deal? OK, if you'll come up here and give-- since these are the proponents, Scott you can go ahead and respond to Mr. Wolens and what you wanted to finish. And then Joe, if you would respond to Representative Turner's question after he talks. Go ahead.

HOCHBERG: Thank you, Mr. Chairman. Representative Turner, in response to your question--

SEIDLITS: You have to speak into the mike, Scott. We're having a hard time hearing.

HOCHBERG: My understanding is that the bill as drafted, the one that I've seen today, would change some of the rights that the consumer has under existing law. Clearly a part of what this bill is trying to do is change the DTPA. It does attempt to change what the consumer ought to be entitled to under law in these type of claims. But to me the real question is, are these changes fair? And do we wind up with a more fair law? And specifically with respect to damages, yes, this bill focuses more upon economic damage, which I understand is meant to lessen the risk we have in public policy with having what is called soft damages, which is often in the eyes of the beholding jury how much you get. And it's one of the types of soft damages that scares the heck out of business. Business is asking you to put safer parameters on that so we can still achieve our most vital function of the courthouse, in my view, and that is to make sure that consumers get compensated for actual economic injury. We need more safeguards to protect business against abusive lawsuits with respect to soft damages. So I think the answer is yes, it does change it, and I think in a good way.

SEIDLITS: Do you agree with that?

WOLENS: Yes, I do.

SEIDLITS: Joe Longley, who are you representing?

LONGLEY: I'm here representing myself and Texas Trial Lawyers Association. I have been active in some of those negotiations that Representative Junell mentioned to you.

SEIDLITS: Representative Wolens has asked that you respond to the question set forth by Representative Turner, and if you would answer that in light of the comments given by these two gentlemen.

LONGLEY: I'd be happy to, Mr. Chairman. Specifically, I represent--

WOLENS: Just narrowly.

LONGLEY: I'm going to give you the narrow 60 second answer. It changes basic consumer rights that consumers have right now in just the examples that were given to you by the gentleman.

WOLENS: Refresh my memory. One was selling books? Mr. Josephson mentioned selling--

LONGLEY: Encyclopedias or whatever, but it turned out to be false. Running back odometers was another example. Many of these are listed in the so-called laundry list. The current law would be changed to make it a little bit more difficult or in fact, impossible for consumers to recover in three ways at least. One would be where the consumer was suing for mental anguish. The proposed substitute takes away the right to sue for any mental anguish whatsoever by the consumer. So you could not get it that way.

WOLENS: Second?

LONGLEY: Second would be where you were suing as a consumer, and you were trying to sue a professional, and a professional had engaged in some of this conduct. Under those circumstances you could not recover. You could not sue the professional for the professional's deceptive trade practices. The third way, and probably the more onerous provision, is that under current law the burden of victimizing someone falls upon the seller. In other words, if they make a misrepresentation, but they really didn't know it was a misrepresentation, the burden for at least giving the person's money back or paying them their actual damages falls on that person. This bill would make you have to show under the laundry list, you have to show in order to get just your economic loss -- you couldn't get mental anguish at all -- but just to get your economic loss, you would have to show that the Act was knowingly violated, which is a far departure, a much heavier standard than what is under current law. So the consumers that these gentlemen have been talking about would have a much more difficult time to recover in just these circumstance that we would all agree would be onerous and heinous type of consumer practices.

SEIDLITS: Thank you. You all can go ahead with your presentation.

SHEEHAN: I did not have prepared remarks today. What I would like to do is go through a few highlights of the bill where I feel I have some specific experience and knowledge, which I think are issues that may be material to you, and just give you my point of view and answer questions on those and see if that would be helpful. With respect to the issue of limiting consumers, the individuals, I personally believe that that is the focus that this bill should have had going back to 1973. It's the pattern which is used in all federal legislation.

[Comments that Members cannot hear the speaker]

SEIDLITS: Let the speaker get right in front of the mike.

SHEEHAN: The proposal to redefine consumer--

SEIDLITS: Pretend you're fixing to be paid by that microphone; get real close to it.

SHEEHAN: Well, I'm single. How about if I'm about to date it; would that be better? The one proposal to change the definition of consumers to where it equals individuals is the pattern which has been used in federal consumer legislation going back with the enactment of the Truth in Lending Act in 1968, and it's worked very well in the federal context, and I think it really is the best place to put public policy here in Texas as well. It really starts to focus this area of law on the true consumer, the individual who buys for personal, family, or household use, and you don't get into all the mixed issues of public policy which you do if you involve business and larger transactions. I believe the proposal to limit the Act to transactions of 500,000 or less, likewise, is advisable. It would be still one of the most aggressive consumer state laws in the country, and would have the dollar amount well over the threshold you normally see in federal law. For

example, Truth in Lending is \$50,000. So it really is, I think, a healthy amount. It picks up most home transactions, so I think that's a good one.

SEIDLITS: I read through Chairman Junell's bill and I haven't looked through the substitute in detail. I was looking for where the definition in the proposal is, where it says consumer means an individual. That's on I guess Page 4, Section 4, whatever.

SHEEHAN: Page 4, Line 2.

SEIDLITS: And you take out partnership, corporation, disstate [?] or-- OK. If I'm a small business, but I happen to be incorporated, and big XYZ Manufacturing comes in and misrepresents some parts that go into, component parts that go into my widget machine, OK? I'm not afforded then any rights under the DTPA as a small incorporated business against XYZ Manufacturing; is that correct?

SHEEHAN: That's correct.

SEIDLITS: Even if its \$50,000, \$5,000 or \$500,000.

SHEEHAN: The argument is--

SEIDLITS: Let me finish. I have a concern that a small businessman, much the same as Representative Turner indicated, is having their rights of recover cut back in this type of situation. Just verify for me, they're out.

SHEEHAN: It's a change, yes, sir. They're out.

SEIDLITS: Now, who does that benefit? Does that benefit XYZ Manufacturing, the big guy?

SHEEHAN: I think it benefits the entire business and legal environment in the state of Texas.

WOODS: But if we were not so concerned about the legal environment of Texas.

SEIDLITS: Representative Woods is going to finish out my questioning for me. Tag.

WOLENS: Should that be our goal on this committee, to protect the legal environment of Texas?

SHEEHAN: Well, I mean legal environment in the context of the reputation, Mr. Wolens, the rest of the country. This Deceptive Trade Practice statute has been heard of, and believe me, it's known throughout the country. And I know of specific businesses who I have been called in to represent on special projects who have got in trouble in this state for one reason or other, and in my opinion they are good companies that try to do things right, and they will not step foot in this state because of the DTPA and the Texas Consumer Credit Code. I know we're not here to talk about that. But when I say legal environments, I mean the reputation of Texas for harsh and ??? law.

WOODS: But we want to discuss facts and no longer-- the reputation apparently sells well in the Senate, but I don't know that reputation is going to persuade me or a lot of other people here. I would prefer discussing facts, examples, case law, and things that I understand -- tangibles.

[Inaudible conversation away from mic]

SHEEHAN: I'll try to do a better job of anticipating that. To me it's a real point. It's one that I have lived with, so it is real to me whether it's real to you or not. And that's a very honest answer.

WOODS: Now, when you say that people are afraid, they're concerned, and they go "ooh" and "aah" because we're in Texas, I have seen that in print a lot that we are concerned with

perception, but I would like to deal with the facts. Now, if you would like to relay specifics with me, I find that very persuasive. I want to go back to something that Curtis said, because it seems like what we're doing in the legislature is to replay what is going on in Congress. There are people who take the side of big business, and then there's the side of little business. And they are businesses fighting businesses. And I think that's what we're doing with the Joint in several. I think it's the big business getting the upper hand over little businesses. There are a lot of mom and pop operators that are partnerships. There are a lot of little partnerships out there. I've worked with you in the Texas Business Law Foundation on changing partnership law. I've worked with you on the Limited Liability Corporation.

JOSEPHSON: Not me, but them.

WOODS: I understand. But to do a partnership, it just takes two people. It just takes two people to have a partnership. There are a lot of partnerships that are out there that you read in a newspaper that a particular Xerox company is going to offer them some kind of service, or they get something from Dell Computer. And for \$199, Dell will give them the extended three-year warranty. They read it, they buy it, they get it, and it doesn't turn out to be true. How do you go around suing for \$199, or how do you sue for the \$2,000? Your law firm, the small law firm won't take it, and your law firm is a big one, and they sure won't take that case. What I'm curious about is why the partnership, the husband the wife partnership, who had been deceived on an installment contract or a service contract, how no longer they have the benefit of Deceptive Trade Practice where their limits -- where their damages are only \$1,000 or \$2,000?

SHEEHAN: My response to you would be in part this. My understanding is that this law was enacted in 1973 based upon testimony by then Attorney General John Hill that this statute only applied to intentional misconduct, and really only applied to consumers in the traditional sense. We have a bit of a unique creature here in Texas. In a way, the burden is being placed on us to come forward and say why we should change something. I think part of the answer was wrong in the first place, that it was just too zealous a public policy then, and what we're asking for is bounds and fairness, and yes, a body of laws in this state that will be more fair to the honest business person that does make mistakes, and yet does not want to be accused of being a deceptive business person. I mean, it is about perception. It's the same way that people under the federal law do not want to be called racketeers.

WOODS: But my question is, you're hurting the little business. I'm looking only at Page 4, Line 3-- Line 2 of Page 4 of your substitute. You are saying that if you get together as a partnership and you are a small business, that you can no longer use the Deceptive Trade Practices Act.

SHEEHAN: I believe it is unnecessary--

WOODS: Even if it's against Dell Computer.

SHEEHAN: I believe it's an unnecessary remedy.

WOODS: Even if Dell Computer or even if their lawyer or even if their accountant or even if their insurance agent or even if their securities broker was deceptive in their advertising, you don't think that they should have any remedy under the Deceptive Trade Practices?

SHEEHAN: I am personally more in favor of giving substantial rights to true consumers and going much lighter on whether you give any special rights and remedies to the small and middle level business person for the simple reason those people are normally able to get adequate representation. There's plenty of other laws in Texas. This is not our only statute. I mean, believe me. There is real estate fraud, there is a number of common law theories. In the past 10 or 15 years we've also had wonderful developments from the plaintiff's side in the area of just basic business torts when the courts have been active. A lot of those areas have been beefed up. I don't see the small business person needing the special rights and remedies which this act has given over the years to the consumer. When I say consumer, I mean the true consumer, the individual.

SEIDLITS: Representative Danburg?

DANBURG: You were just saying that you were in favor of giving stronger remedies to consumers. Can you list what stronger remedies you're in favor of giving to consumers?

SHEEHAN: I'm not sure if I agree personally. And again, I'm not one of the draftsmen here, so they may shoot me, but I'm just going to answer your question honestly. I'm not sure of the waiver. The provision here works pretty well, and I would recommend that that be looked at a little bit more. I get some concerned about adhesion contracts in the consumer context. The fact that it has to be signed by a lawyer, I can tell you is a practical matter, most consumers don't walk around with lawyers, at least in advance. [Not audible side conversation] As I said--

DANBURG: Those aren't stronger provisions. Those are current provisions.

SHEEHAN: Oh, you mean even beyond what the DTPA does now?

DANBURG: I thought that was what you meant when you said you were in favor of stronger provisions for consumers and not for--

SHEEHAN: I don't think I meant it in that context, but I am truly an advocate of having a special body of laws protecting true consumers. I mean I'm not trying to waffle, but frankly, you catch me off guard.

DANBURG: One other thing. OK, the Deceptive Trade Practices Act was written in 1973.

SHEEHAN: That's correct.

DANBURG: And is it your position that basically it's been amended by the legislature to go beyond the original intent, that we've had a number of amendments and it's been problematical, that we've made it worse for business with the amendments?

SHEEHAN: No, I think actually efforts have been made to make it better for business over the years, but more work needs to be done.

DANBURG: The reason I'm asking this is that people who have called our office have been given the impression by your sponsoring organization that the pendulum was in one direction 20 years ago, and that the pendulum has swung the other direction to be more against business, more pro consumer. I found that to be an interesting perspective on the part of my consumers. Because I recall voting on tort reform bills. How many times have we amended the Deceptive Trade Practices Act in the last--

SHEEHAN: Almost every session since '73.

DANBURG: OK, when Dick Weekly came to talk with me in my office, I asked him if he was aware that we had been dealing with tort reform, and I have been on this committee since I was a baby. I've been on this committee since I was younger than Brian. I recall voting on tort reform amendments session after session. He was unaware that we had had tort reform that was pro business. He was unaware that I had voted for either all or virtually all of the tort reform bills. In fact, I think the perspective that has been promulgated to people in my district is that I am, in their opinion, unfriendly to business. And there have been phone banks to try to promulgate that opinion to people in my district. I think you're correct that we have amended this bill virtually every session. I think that you are correct that virtually every amendment has been, if anything, a way that has limited the Act and made it harder to recover. And I am pretty sure that I have voted for tort reform every session. So I'm not quite sure why I'm being castigated amongst my own constituents by your organization.

SHEEHAN: Not my organization.

SEIDLITS: He's appearing for Texans for Business Law Foundation. The Texans for Lawsuit Reform, I believe, is Richard.

JOSEPHSON: I did not know, and have no personal knowledge of that. As I mentioned to you this morning, about two weeks ago I had the opportunity to go over the bills as they were coming through the Senate. So I am here, not as part of the lobbying effort in the sense of individual contact with representatives, but as somebody who has practiced under the law. If I was to categorize this so you'd understand what I think the problem is from my own perspective, and the perspective of many, on one hand we have consumer transactions. And we can debate what the language should be to cover those consumer transactions. That was my original illustration, whether smaller businesses should be involved or not. But the major problem with this legislation is the fact that it has been applied well, well, well beyond consumer transactions. That's the fundamental problem with it. It's now used in products liability litigation, it's used in malpractice litigation. It's used in virtually every type of litigation where there is either a specific law, such as the Texas Securities Act in security transactions, or the common law, which would allow a whole host of individual remedies. And the other problem is, because of the general language and the fact that it was meant deliberately to be made easier to consumers when it was enacted in 1973, people are getting around the intent of the legislature in passing other laws that deal with specific professions, or the courts in dealing with the construction of negligence or strict liability and using this statute in a manner which I do not believe was originally intended. And I say that from being an active participant in the debate and discussion when this legislation was being proposed.

DANBURG: One of the things that was pointed out by Mr. Wolens and by our chairman, that I think really is at the heart of this issue is where does the term consumer stop in the domino chain, and therefore, liability stop? My experience is in the fitness equipment business, OK? He sold somebody 14 rowing machines that are going to be this color and these specs. And then when he gets them from the company, they're not that, OK? Obviously the consumer he sold them to is a consumer, OK?

JOSEPHSON: Sure.

DANBURG: Then he's next up the line. He's a small businessman, a really, really small businessman. Big guy, but small businessman. He's a consumer, right?

JOSEPHSON: Correct.

DANBURG: Because he's getting the short end of this stick. I mean, he ordered something. He sent them money up front. He got something else. He shouldn't be stuck with it, OK?

JOSEPHSON: OK.

DANBURG: Is the guy next in line, the manufacturer a consumer when he ordered something and got something else, and then passed it on through? So where do you stop? Is the heart of the issue whether Bob's in a partnership or not?

JOSEPHSON: No. I'm still trying to divide those types of transactions. That is a pure consumer transaction, from everything else that this Act has been applied to. So, a products liability case-- personal injury -- maybe that's a better way to say it. A personal injury case where you already have negligence, where you already have strict liability, where you may have the malpractice statute, where you may have other remedies.

DANBURG: And that's all true, but by the end of the session they won't have any of those, so in this particular bill-- I thought the whole purpose of the Deceptive Trade Practices Act was to make it so clear that you discourage litigation. When you tell somebody there's something wrong, they've got 60 days to cure it. If they're shooting straight with you and they give you what you really are supposed to be getting, there is no lawsuit. It's the essence of anti-litigation. You know, you play fair with each other and that's the end of it.

JOSEPHSON: In the real world it's worked exactly the opposite. It has been held as a club over business. It has been held as a club over professionals because they know-- a lawyer has to stand or an accountant or any professional has to be able to defend his conduct, and nobody is suggesting that he shouldn't. Should he be asked to defend his conduct as a professional on whether he was negligent or not, that is whether he failed to use ordinary care? Or should he be put under the umbrella of in effect a strict liability statute that basically is result oriented and says if it was a bad result, even if you didn't intend it, you're liable. That's the problem we have under the current legislation.

DANBURG: I'm not a plaintiff's lawyer, so I don't really know, you know, what kinds of situations might come up. But if it's beyond just negligence. You know, if I were to say in an ad, "I'm the most successful lawyer in the universe," and to the client, "I can triple whatever you're going to get out of this case if you go with me instead of somebody else," those are deceptive trade practices. That is not just negligence.

JOSEPHSON: Sure.

DANBURG: That is a deceptive trade practice. Why should I be held to a lower standard than a plumber?

SHEEHAN: Well, I just want to make one point. You are referring to lawyers and that's another thing I want to comment on. I do think that at least with respect to professional opinion giving, the DTPA should-- I mean, that those should be exempted from the Act.

WOLENS: How about trade practices with professionals?

JOSEPHSON: The main thing that I would say about lawyers-- and that's the main point I wanted to come and talk about today is that we do, in fact, have an effective grievance process. And each issue of the Texas Bar Journal--

WOLENS: Nobody follows--you know what, I follow that stuff. I read that stuff, and it's a bunch of bunk. They're just a bunch of pals on there. They're pals with each other. Everybody's a pal of somebody else's.

SHEEHAN: I respectfully disagree with that, sir.

WOLENS: I am sorry. I just couldn't-- sorry. Please continue, because I liked what you were asking.

JOSEPHSON: I didn't mean not to answer your question. I'm just trying to basically give you the perspective from our standpoint. I know there are a number of people who wish to speak, and perhaps have these experiences that may be able to shed some light on some other questions that you may have. Mr. Chairman, if you...

[End of Tape 2, Side B]

[Tape 3, Side A]

TURNER: ...they do not have a claim on the Deceptive Trade, right?

JOSEPHSON: That's correct. They have other bases, they have law for legal claim, but not as consumers under the Deceptive Trade Practice Statute.

TURNER: So if they buy, let's say they buy an expensive tractor--

SEIDLITS: Over \$500,000.00.

JOSEPHSON: I'm sorry?

SEIDLITS: If they're an incorporated farm in operation, they're out.

TURNER: If it's under \$500,000.00 and they buy a tractor for example, and they buy a tractor based upon the representations that were made. And the way the bill is presently written, those farmers are out, correct? They do not have a claim under the deceptive trade.

JOSEPHSON: You said they're a partnership.

TURNER: Right.

JOSEPHSON: That's correct.

TURNER: And the reason why they formed a partnership was in order to pool their resources in order to buy this expensive equipment. Or a family for example. Under your definition, the way it is presently written, those individuals cannot bring a claim under the Deceptive Trade Practice Act.

JOSEPHSON: That's correct. If the tractor is bought in the name of the partnership.

TURNER: OK. Thank you.

SEIDLITS: What is the policy reason from distinguishing between if I choose to be a sole proprietor in that same type of situation I would have a claim, as opposed to if my accountant gave an opinion that I should be incorporated, or some other form of business entity with my family or my neighbor. What's the-- ?

JOSEPHSON: I think what the answer is that we're proposing you would not ??? the same public policy choice made by Congress in 1968 for limit consumer to individuals, but then in doing so you do it ten times higher than Congress ever has. They limit to \$50,000. This bill would be \$500,000. So at one level it would give them 10 times more consumer protection.

SEIDLITS: If I knew those things, then my accountant and my lawyer would represent to me or give me the advice not to incorporate, or at least would give this as one reason not to incorporate. Is that right?

JOSEPHSON: That's correct.

SEIDLITS: Let me ask you to, I agree with Representative Wolens and Danburg, and I think Debra agreed on it. At least in the opinion giving, if an engineer gives an opinion, you know, there are ways that that differentiates from the way than if they just may mess up a project, OK. And I'm not really concerned about-- I'm concerned about the professionals and in advertising, but not necessarily-- But I'm concerned about the small businesses with these large companies, and in many cases from my experience, the small business, the only thing that you can hold hammer on some of these out of state companies that are doing business here in Texas, is with some type of club, if you want to say it's a club, or with a strong law to make them do something. What's your response to that?

JOSEPHSON: I don't think it's as ??? as you make out, and I think we have other laws in Texas that work well. And I think the risk of taking that is not that great, and the benefit we pick up as a state is proof of imposition of our laws. I don't think that is a significant factor.

SEIDLITS: I was just noticing here in the first page where you strike basically all-- in the law still about the business consumer assets of \$5 million or more. Can you relate how that plays into litigation right now. On the waiver.

JOSEPHSON: I think that's known as the Exxon amendment; I think it came in in 1979 for a very large transaction sum, you can have a DTPA waiver.

SEIDLITS: All right, so that's big guys with big guys.

JOSEPHSON: That's what it's been to date. I believe that was passed back in about 1979, and it was an effort to get very large transactions out of the DTPA by way of permitted waivers.

SEIDLITS: OK.

JOSEPHSON: It was an earlier lobbying effort by a specific group for a large transaction.

SEIDLITS: I don't have any clients that have \$5 million, but tell me if I'm in a copy with assets over \$5 million and I need the other provisions of the 1742 as it is now that I have my lawyer and we waive this, then that takes me out of DTPA.

JOSEPHSON: Under the current proposal, it would take you out of DTPA.

SEIDLITS: So would it be fair to say that there is a remedy -- not a remedy, but there's a provision for myself as a business with substantial assets, \$5 million or more, to take myself out of the DTPA and many of the transactions with other businesses of the same size or bigger.

JOSEPHSON: As things currently stand?

SEIDLITS: Right.

JOSEPHSON: You could.

SEIDLITS: OK. Now, set aside the professionals over here, all right, just forget them, say we exempt them all out. Who does the bill benefit the way it's drawn right now? Who is the big winner on the bill?

JOSEPHSON: The big winner is the fact that the bill will apply to consumer transactions as it was originally intended, and not to every facet of Texas law. That's-- so I think the state is the winner.

SEIDLITS: There could be an argument about goods and services, so what if we just did away with all the services. The professional services; we can pass that amendment, OK, except for maybe the marketing deals that we're talking about. And if this \$5 million versus \$5 million if we left it in there, where a big company couldn't sue a big company, if they decided to waive the DTPA in a negotiated contract, OK.

JOSEPHSON: OK.

SEIDLITS: Who does the bill benefit?

JOSEPHSON: It would cut out the litigation involving areas other than consumer transactions. Products liability.

SEIDLITS: Who are we talking about that's producing, manufacturing these products. Ford -- would Ford benefit from the bill?

JOSEPHSON: Sure. Any company that manufactures a product, or a distributor that may have had something to do with the transaction. A garage mechanic who might have had the opportunity along the way to fix the car and would be dragged in in a typical DTPA action, the auto repair shop on the corner.

SEIDLITS: But he's going to get dragged in on the joint several bill that they passed the other day in the Senate anyway.

JOSEPHSON: Well, here--

SEIDLITS: What I'm asking here is who really benefits from the bill, given the factors that I've just laid down. Is it the big companies?

JOSEPHSON: Big or medium sized or small companies, any companies. I think you are going to hear from some people here that the way it's being used now that some of the small businesses are being dragged in to the DTPA litigation as it exists now, because of the fact that it goes outside of the pure consumer transaction. So part of the argument is if it's left to consumer transactions, then you've got professionals, you've got different sizes of businesses who are being dragged into litigation which at least--

SEIDLITS: I just did away with the professionals.

JOSEPHSON: OK, and I understand that leaves businesses. That leaves primarily businesses or individuals who might be dragged into litigation that's not consumer litigation.

SEIDLITS: All right. What if we put the \$500,000 deal in. Now who does that benefit?

SHEEHAN: If you put the \$500,000--

SEIDLITS: As a definition of the consumer transaction it can't go above-- I think that's what you all said isn't it, \$500,000.

JOSEPHSON: Sure. That would clearly and again that would clearly benefit the groups who you've either taken out or who would be left if you didn't take them out. That would be everyone else other than consumer transactions.

SEIDLITS: I'm lost.

WOLENS: I'm lost too, and I wouldn't mind getting a straight answer if you want to ask the question again.

SEIDLITS: Well just tell me. I'm trying to find out, and like I say, the professional opinions, I understand that, I understand the concern professionals have in that area. OK? We just took them out. And if it is big boy versus big boy over \$5 millions and they negotiate and waive it, and then there's a gap somewhere between zero and \$5 million I guess, is what we're looking at. And then if we pass the \$500,000 deal, transactions less than 500,000, I guess most what we think of consumer's buying automobiles or toasters or things of that nature would be below the \$500,000.

JOSEPHSON: That would all be left.

SEIDLITS: OK. So who benefits out of that? Is it the people that make the products?

JOSEPHSON: People who either make it or are in the chain that are involved in the manufacture would be one of the major groups that would benefit.

SEIDLITS: Well the ones that are in the chain, as I recall the Products Bill there are supposedly innocent retailer type provisions.

JOSEPHSON: Right, I'm talking about the non innocent retailer, that is, where there is an independent act of conduct alleged to have occurred--

SEIDLITS: Well, they should be in there.

JOSEPHSON: Well, I'm not arguing that but what we're saying is where do you want them to be.

SEIDLITS: Well, you just told me that we would drag in those people.

JOSEPHSON: Where do you want them to be though, the real question is do you want them to be in the negligence cause of action, do you want them to be in the strict liability cause of action, which is pretty tough even of it's own right. Do you want them to be over on that side, or do you want somebody to be able to use a consumer protection--

SEIDLITS: So basically your argument is that we just should limit the causes of action available to the person that is wronged, or allegedly wronged, in that type of situation.

JOSEPHSON: Yes, in a consumer economic type situation. He ought to be able to file his lawsuit and be able to seek recovery under this Act.

SEIDLITS: Representative Bosse has a question.

BOSSE: Let me carry on a little further from something that Representative Wolens and Representative Danburg talked on. One expressed intent here is to exclude from the coverage of the Deceptive Trade Practice Act professional negligence, or the various professions if you meet these conditions. Another type of liability, though, exists where I think they brought up the fact that there was deceptive advertising or something like that. That's a little bit different than negligence. Let me cover a third type of liability. How about stealing? I mean what happens if in the course of providing a professional service you end up in possession of your client's money, and you steal it. Under this Act the consumer from whom you took the money has no action against you under the Deceptive Trade Practice Act, is that right?

JOSEPHSON: I don't know if it would or not.

BOSSE: Well, the wording of the Act seems to be that if a cause of action arises in the course of providing a professional service, then it doesn't fall into the coverage of the Act. That's the way it's worded, right? So if in the course of providing a professional service you steal the money, you're excluded from coverage under the act, the consumer. And the basis for that is that if that professional is carrying professional liability insurance, right?

JOSEPHSON: That's correct.

BOSSE: But professional liability insurance policies specifically exclude coverage for fiduciary theft, don't they?

SHEEHAN: I don't know.

JOSEPHSON: I think you're right basically, but what I would respond to in response to that is again a question of where do you want your remedy to be, because clearly, as we all know, there are a number of other remedies that one would have if someone stole money or embezzled money. and the real question -- which would involve reimbursement and which would involve the possibility of recovery of punitive damages. And so the real question is do you want it under this statute or do you want it in the other way it's allowed. Nobody is suggesting we shouldn't have it.

BOSSE: But why have the Deceptive Trade Practice Act at all, then, because if I have another remedy if somebody cheats me on my toaster, and like you said, I might have as many as five other remedies. I mean I've got a common law remedy, I've got a contract remedy, I might have a remedy for who knows what on toasters. Anyway, but what we're doing for the lawyer in ??? ??? is that we're giving that person a break under DTPA, when the consumer has no recourse under the insurance policy that we are requiring as a prerequisite to the ???

JOSEPHSON: I'm a little bit reluctant on this, because as I think Mr. Longley and I think the sponsor mentioned to you, there are some discussions that are ongoing on issues that you've brought up. And I know what's here now, but I also know--

SEIDLITS: Todd Hunter tells me that some of those things are being addressed.

JOSEPHSON: Right, and I'm hesitant to try to undo whatever is being done that obviously you passed final muster on. but I know some of the same concerns you addressed have been mentioned in some of those discussions, and are being considered, and people are attempting to address them. I really came here to discuss the fundamental "which way are we going on the DTPA" -- is it going to a consumer bill or is it going to apply to all these other things. And professional services, as you point out are one of those things that need to be resolved.

SEIDLITS: Do you have a question? He had told me he had a question.

WOLENS: I do, but there are other questions.

SEIDLITS: Representative Jones, then Wolens, then Tommy -- Tom, you got one, too?

JONES: I've got a non-lawyer question. Are we hung up here on the definition of consumer, is that what I'm hearing? If the consumer can only be a single one person out here only, is that kind of what it narrows down to?

JOSEPHSON: Page 4, line 2.

JONES: Yes. Then the other thing that I'm curious about you, your name is Richard I believe? You say that whatever happens to these people that are being excluded, they've got other remedies, but if they've got other remedies and this is an easier remedy, why should we preclude them? Are we doing it just for the convenience of defining what remedies are? I'm kind of confused is what it amounts to.

JOSEPHSON: OK. Let me put it this way and see if I can give you the answer. Under this current legislation, the way this bill is read if you do something and it turns out wrong and you were totally innocent -- that is you didn't intend for it to turn out that way. You acted as professionally as you could possibly act, you did everything you could have, but you represented x and it turned out to be y. Right now under that statute you can be found guilty, whereas under ordinary negligence somebody would look at you and say "Representative Jones, did you exercise ordinary care, that's what I want to know. Did you try to do a good job?" Under this statute that inquiry isn't made. That inquiry, nobody asks whether you tried, no one asks whether you tried to exercise ordinary care, no one asks whether you were prudent. They just said "did you say x and did it turn y?" and if it turned out y, you pay. Now, there may be a narrow class of causes of action where that's a good law; where maybe there are egregious circumstances where maybe that's right. But if you start extending that to everything, it totally distorts the system we've lived under, we've grown up under, and all of the court decisions, and statutes that this legislature has asked in other areas that basically say you've got to have fault. You've got to be responsible, but you had to do something wrong. You have to defend the consequences of your act.

JONES: Well, could we include there that reasonably prudent approach, that if I was just totally negligent, didn't really pay any attention to what the guy said, you know, going to sell that aluminum siding or whatever else you want to put in it, and I just signed the contract and never did even read it, then I'd say it wasn't very prudent if that were proven. So could we put reasonably prudent in here and solve that problem?

JOSEPHSON: There is an intent made now to try to solve in part of that problem by changing the definition of "knowingly," so that you had to know. The question you've asked me is exactly the question that others ask, and that's why there is an attempt in this bill to define-- it's not just that you did it; it's did you know the consequence of your act when you did it? And there's a definition of the term knowing.

JOSEPHSON: Delwin, I suggest to you that if you read all this language, and it's still not going to take care of the little people that read this stuff. The people who are in West Alice, for example, who has somebody coming round and selling them insulated windows that are grossly overpriced with extremely high interest rates, and the people are there paying \$95 per month for the next five years for these insulated windows that don't even work. And no lawyer will ever take that case because the whole thing was only worth \$3,500 and if you add the interest rate it comes to \$15,000. And it's not a usurious rate it's just a lot of money. And the windows don't work, and you'll never get a lawyer to take the case. And I'm sure in the contract somewhere there will be something that takes care of all these problems from a lawyer's point of view. That company that the sleazy agent works for would have had the finest lawyers in the world prepare a wonderful contract that they'll never be able to sue them. And after this thing passes that poor fellow that's buying the insulated windows will never have a cause of action, never have a remedy, and another reason they'll never have a remedy is because they'll never get a lawyer to take the case.

SEIDLITS: Representative McCall has a comment. Tom, go ahead.

MCCALL: This bill was originally designed or written, or passed in 1973 for consumers only. So I assume, and not being a lawyer, I assume that in our law we take care of partners and large corporations and other injured parties in other laws.

JOSEPHSON: Correct, we have always taken care of them in traditional negligence or strict liability type of laws.

MCCALL: So why over the years did we start putting them into this law?

JOSEPHSON: Because what happened was certain lawyers, and I don't blame them, they saw this statute on the books--

SEIDLITS: Wait just a minute, wait just a minute. Let me go back to the original act where it talked about -- and I can't find it right now -- but it was business entities with less than \$25 million assets.

JOSEPHSON: Not in the original.

SEIDLITS: When was that changed?

JOSEPHSON: That was changed much later. In the eighties.

SEIDLITS: Well let me look here.

JOSEPHSON: '79.

SEIDLITS: All I'm saying is that at some period in time consumer was defined as individual partnership, corporation, blah, blah, blah, and it was set a \$25 million on it. So somebody intended for those people that Tom's talking about to be brought under this act at some point in time. Is that correct?

JOSEPHSON: Well yes, but that was really to correct a problem where businesses were using the statute, large businesses were using the statute to sue other businesses. And that was initially--

SEIDLITS: So the legislature recognized that and whittled it back or narrowed it back where we wouldn't have the problems that we're talking about today.

JOSEPHSON: As to those businesses. What happened though, what happened in response to Representative Ramsay, what happened was when this statute was written as broadly, people sat around and said "I wonder why this can't apply to a personal injury case? I wonder why this can't

apply to a malpractice case? I wonder why this can't apply to anything?" and they begin filing lawsuits under this statute, not as consumer actions, but as actions in these other areas. And then the courts came in and said, "Well, you know the statute doesn't say specifically that it's limited to just consumer transactions." And so before you know it, we've got a whole new body of law, and it applies to everything. This legislature has worked over the years-- its really not worked on that aspect. What the legislature has done is worked the mandatory trebling, you may remember that we had at one time, where even if you did something innocently, but you did it, your damages were automatically trebled; that was deleted in 1979. There were some other changes made on the periphery, but the basic problem as we see it that this legislation is designed to cure is where do you draw the line at a consumer transaction.

WOLENS: Sir, let me, I've got a real weak mind and if I don't ask you I won't remember. But there is places in the law today where a partnership can go get relief for damages that may happen to a consumer under this bill.

JOSEPHSON: I can think of five to six different ways you can bring that action today.

WOLENS: OK. And there's a place where a corporation can do the same thing.

JOSEPHSON: Absolutely.

WOLENS: There's a place where everyone in the State of Texas can go and get relief under a law other than this law.

JOSEPHSON: That's absolutely correct. This law mostly duplicates everything else that we already have.

WOLENS: Thank you.

SEIDLITS: Representative Hochberg.

HOCHBERG: I am, like several of the members who have just asked question, I am neither an attorney nor a veteran member of this committee, so I'm probably going to ask some stupid questions. I'll try to keep them short. But first of all, could you clarify for me, I have a whole lot of security associations, civic associations, and neighborhood associations in my district; where do associations fall in this law? If they don't look like they're expressly permitted, I just don't know under law where they go.

JOSEPHSON: They would not be individuals.

HOCHBERG: They would not be individuals, so my civic clubs and my security organizations and such lose their protection under DTPA under this? Churches?

SHEEHAN I think we're asking you to realize that they have adequate remedies elsewhere, and that the relief is not needed here.

HOCHBERG: But they lose their protection under DTPA. Secondly, I'm kind of hung up over this definition, over this moving of "knowingly" to "intentionally," Because that seems to apply not to segregating people out, not to segregating types of transactions out, but to me it raises the standard that you're going by. and I'm looking at the definition of intentionally back here, which I've got on page 4. And I'm trying to understand how a good attorney like either of you would go in and prove that somebody intentionally, i.e., had the specific intent that the consumer would detrimentally rely on the false, misleading, or deceptive act or practice. How would you prove my intent in that case?

JOSEPHSON: I think you've got to go to the next sentence, which basically says that intention may be inferred from objective manifestations that indicate that the person acted that way.

HOCHBERG: And I don't know what that means.

JOSEPHSON: Well, translated that simply means if I am representing you, I'm going to try to find out what this fellow's track record is, how many times he's done this, what does his marketing material say, what does his literature say, has he ever gotten in any trouble from that before, did he know there were any problems with this type, if we're talking about written material, what kind of person is this.

HOCHBERG: So you've got to get either get a character, you've got to either prove his character or you've got to look to prior convictions or prior problems?

JOSEPHSON: No, but what we're asking for was intentional. You're saying "I don't just want to hit you for what you took; I don't just want this man to be paid back for the money he paid you; I don't just want him to get his attorney's fees. I want you to be punished, I want you to be punished up to at least two times or three times whatever it was this man is out. If this man is out \$10,000 I want to get another \$30,000 from you plus attorneys fees."

HOCHBERG: I don't understand the difference, and again, not being an attorney, I know these things are defined, and I want your help with this. The current standard is knowingly right?

JOSEPHSON: For punitive damages, correct.

HOCHBERG: For punitive damages. And that means that I am aware of what it was that I did when I committed that act which is a deceptive trade practice.

JOSEPHSON: Right.

HOCHBERG: In addition, you have to prove that not only did I do it, and then I knew that I'd do it, and that I knew what I was doing, and that I knew that it might be deceptive, but that I was intending to deceive?

JOSEPHSON: No, the way I think-- what we've done is we've shifted "knowingly." I was talking about a standard that currently existed that's basically a no fault standard. What we were asking the Committee to do was in the bill to enact legislation which said that you couldn't just take an innocent person and make him responsible under this act anymore. You had to prove he acted knowingly.

HOCHBERG: But he already had to have acted knowingly, didn't he?

JOSEPHSON: No, absolutely not.

HOCHBERG: No?

JOSEPHSON: No, now, under the revised legislation before you, he now has to act knowingly. He did not have to act knowingly before.

HOCHBERG: Then please look on page 7 and explain to me where I'm misreading this, because the language that I'm reading here says "if the trier of the fact that has existing law" -- down at the bottom of the page -- "the trier of the facts finds that the conduct of the defendant was committed knowingly, the trier of the fact may award not more" etc. etc. That's current law.

JOSEPHSON: Current for punitive recovery of the equivalent of exemplary damages is a knowing standard.

HOCHBERG: But that's not a no fault-- that's not an unknowing standard like--

JOSEPHSON: For actual damages it is; that's my point.

HOCHBERG: But the change that your making is on the punitive damages side.

JOSEPHSON: Both sides.

HOCHBERG: OK, then talk to me about the punitive damages side.

JOSEPHSON: OK. On the punitive damage side, if you look at intentionally in the definition of intentionally, it is very close to what the old knowingly definition was. So basically we're calling it intentionally, and it is stricter, but it's very similar. You still look to objective manifestations. What we're basically saying is now that if you think of the old knowingly, the old knowingly used to get you punitive damages. We're now calling that intentionally. Still gets you punitive damages, still gets you up to three times the amount of actual damages. What we're building into the rest of the bill is using the word knowingly to say you can't find someone responsible if they act innocently anymore; you have to at least found that they knew what they were doing. That's to recover actual damages.

TURNER: I just want to make sure that I'm clear. Under the bill that's being proposed, is it not true that you are almost merging the recovery for economic damages, step one, with the exemplary damages on the second half? In terms of the standard, before you can even get the basic recovery you must almost prove the exemplary damage element. You are merging the two.

JOSEPHSON: No, because all it says, Representative Turner, is that knowingly means actual awareness of the falsity, deception, or the unfairness of the act or practice. You have to know that, and that's all we're saying. There are people who would argue and say that you should have always had to know, that but the statute didn't originally require that.

TURNER: Yes, but as lawyers we can go back and forth. But I think what Scott is getting to, and I'm going to throw back to Scott is that you've got the economic recovery and then you have the exemplary recovery. And the way the bill is written you raise, you're raising the standard for them alone. The way this bill is written you are increasing the standard in order for the consumer to recover his economic damages. And then on top of that what you are doing is that you are changing from actual damages to economic damages, so you're cutting what the person can receive. So you're reducing what a person can recover, and then you're raising the standard for them to recover smaller damages.

JOSEPHSON: I agree with you on the first part, but I don't agree with you on the second part. Namely, I agree with you that the standard is being increased so that you at least had to know what you were doing on the actual damage side.

TURNER: You agree with me on that, right?

JOSEPHSON: That you'd have to now know what you were doing.

TURNER: You're agreeing with me there. Now let's talk about what a person can receive. Under the present law a person can receive actual damages, correct?

JOSEPHSON: Correct. But the actual damages and economic damages, except for mental anguish are very similar.

TURNER You're playing games with me and I don't want to play games. All I'm saying to you is that what a person can recover is not one and the same under this bill and under present law. They are not one and the same.

JOSEPHSON: Because mental anguish has been eliminated.

TURNER: Yes or no. Are they the same or not the same?

JOSEPHSON: No, that's what I'm saying.

TURNER: That's all I want from you. That's all I want.

HOCHBERG: Where does the bill say you need to have a knowing violation in order to recover economic damage?

JOSEPHSON: Page 5 I believe. Is that where we're looking? Hard to tell. Bottom of page 5, where prior of facts finds were committed knowingly. It's a little hard for me to tell where that subsection goes.

SEIDLITS: D1736.

DANBURG: But one thing that we seem to keep on forgetting here is, just like good old Marvin Zindler, I mean the beauty of the Deceptive Trade Practices Act, my recollection of why it was passed in the first place, is to say if you're a consumer and you get the shaft, you don't get what you paid for, then you can give them 60 days notice, they can fix it and you don't have to sue at all. You don't need lawyers, you don't need any costs, you don't need anything. If Marvin Zindler calls you on the phone, who has ever said, "No Marvin I am not going to fix this. You know, I promised him black carpet, he got blue carpet, and sue me." Nobody does that; they don't want to get sued, so they give him the black carpet he ordered. Why do you have to know, if you're the carpet salesman, why do you have to know-- I mean, the guy who just finished selling me carpet the other day, once he sold me the carpet I never saw him again, OK. The workers had shown up with green carpet, he might not have known that I was getting green carpet. But I would expect him when I called him and gave him 60 days notice to change it back to whatever, I would have expected that without having to sue, without having to go to court. If I ended up having to sue him because he said, "Hey it's green carpet; live with it." Whether it was knowing or not, you'd better bet to get more than just the new correct carpet, and maybe my attorney's fees. If I had to go through that stress and had to live with green carpet until I got the money to fix it, you know, I would want something more than that. But I would give him notice, I'd give him 60 days to get me the new carpet, and we wouldn't have a lawsuit at all.

SEIDLITS: We had been handed a note a while back reminding us that there are a lot of other witnesses. So I think at this point ??? ??? much better answers ??? ???. Because I know at least me, I'm exhausted.

DANBURG: Briefly, if I may. I know you are tired of being badgered, and y'all were first up and you getting--

JOSEPHSON: Oh no, that's fair game.

DANBURG: Y'all have been very-- you know, I think you've exhibited professional ethics with us, you've told us some things that you share our concerns with about this and I really appreciate it. And it's also nice to know that people who are from my area of Houston are going to have to get demonized along with me because we share the same concerns about this bill. I mean, they'll demonize you and me for being worried about certain aspects of the thing that we're looking at here.

SEIDLITS: Representative Wolens has a question.

WOLENS: Mr. Sheehan, Mr. Josephson, I have heard your reasoning why we need to protect the lawyers of Texas. Explain to me now why we need to protect the insurance companies of Texas for deceptive trade practices in this state.

JOSEPHSON: Well, we have an -- I'm not saying we need to protect the insurance companies or anyone else, what I'm saying is where do you want to do the protecting. That was the theme of my speech here. Where do you want to do the protecting. Do you want to do it through the Deceptive Trade Practices Act, or do you want to do it through the other statutes that are

available to do it. It's not a question of not protecting the consumer against wrongdoing by anybody it's a question of where do you do it, where do you draw the line.

WOLENS: So is it your position that if we take the DTPA remedy away from insurance deceptive conduct, that the same remedies remain for a consumer in the insurance code?

JOSEPHSON: Do you do it under 21.21, do you do it under negligence, do you do it under fraud, where do you do it.

WOLENS: In the insurance, I thought I heard you just to say I wish we could read back the transcript immediately -- is it in the insurance code, are the same remedies that are available to consumers for deception in insurance acts, are those same remedies available under the insurance code.

JOSEPHSON: Not unless you go through the DTPA.

WOLENS: OK. Therefore, you are eliminating some remedies to a consumer for deception by an insurance company in this proposal. Is that accurate?

JOSEPHSON: Under this proposal, that's true. But I would point out that this is another one of those areas which I felt, which is why I did not bring it up, it's one of those areas which I understand there is some ongoing discussions about that particular area, and I don't in which form or whether that if your particular problem will be answered or not, that's why I hesitated in getting involved. You're absolutely right, and I want to be honest with you about the way the legislation looks now.

WOLENS: Tell me, so it's clear to all of us here, what remedies does this substitute eliminate from a consumer. Which remedies does it strip from the consumer against an insurance company or an insurance agent for a deceptive trade practice?

JOSEPHSON: Under this legislation you go through, as I understand it, you currently go through Article 21.21 and you have the benefit of a similar group of misrepresentations or deceptive practices which are enumerated in that statute, if that's what you are referring to. And you are able to get into that statute through the provisions of the DTPA and go against the insurance carrier and find violations under the DTPA to get into Article 21.21, which you would otherwise not be able to do. If that's what you had in mind.

WOLENS: By passing the substitute does this benefit the insurance company?

JOSEPHSON: If you're talking about--

WOLENS: To the detriment of the consumer.

JOSEPHSON: As to that one area, it would.

WOLENS: As to the area of deception.

JOSEPHSON: As to the DTPA, it would. And I'm hesitant, because as to deception, fraud, the answer is absolutely not.

WOLENS: As to a deceptive trade practice.

JOSEPHSON: Sure.

WOLENS: So this bill would benefit an insurance company and an insurance agent to the detriment of a Texas consumer with respect to deceptive trade practices.

JOSEPHSON: Deceptive trade practices, but not deceptions.

WOLENS: I understand.

JOSEPHSON: Because you'd still have fraud and all of the other remedies.

WOLENS: Only if it was intentional deception, then you could pursue it under fraud is that right?

JOSEPHSON: Negligent misrepresentation which does not require intentional conduct, which you currently would have the opportunity to file an action under that. But I understand what you're saying and I want to be perfectly honest with you.

WOLENS: Can you think of a single policy reason why insurance companies and insurance agents should be protected from the Deceptive Trade Practices Act?

JOSEPHSON: Again, the question is where do you draw the line.

WOLENS: I have heard why we are protecting lawyers; I want to know why we are going to protect insurance companies.

JOSEPHSON: I didn't advocate protecting lawyers.

WOLENS: Somebody did; go ahead.

JOSEPHSON: But no, I mean it would fall into the same category: do you want to make this a consumer protection statute -- where do you want to draw the line?

WOLENS: This is my experience, and pardon me for sharing them with you and you may not care. But I have seen so many that call me up as legislator, not as a lawyer but as a legislator, and say that problems with insurance, constantly problems with insurance, constantly that their automobile is totaled, is an uninsured driver, and the insurance company pays them far less than the market value, and they beg me to do something about it as a legislator, then they beg me to do something about it as a lawyer, and I say you're only getting screwed by \$500. You're being ripped off by \$500, and I cannot help you as a lawyer and I can't help you as a legislator over \$500. And maybe there's some law firm out there that would take on a case for the damages of \$500; there are not very many. But at least they have the DTPA and Article 21.21 to do it. I feel my heart goes out to the people that have these problems, and there's no way to ever get even with the insurance, there's no way ever to make it right; you never make that person whole. I was just talking to someone two weeks ago who had a policy of insurance who thought that had uninsured; they thought they had uninsured it was advertised as being uninsured. And they were hit by an uninsured driver and the car was totaled. And number one, they didn't get full compensation for their automobile. I'm not talking about personal injury; I'm just talking payment for their car, just a car so they can go to work. They still don't have a car to go to work, it's been two weeks. They have not got reimbursed by their insurance company. I'm sorry, it's been four weeks. They have not been reimbursed by their carrier for the total loss of their car that was recognized and realized by the carrier three days later; they don't have their car. Their insurance agent has not been willing to reimburse them for the premiums that are owed them, and refuse to cancel their policy even though they don't have a car. They refuse to cancel the policy. To me it sounds like a deceptive trade -- seems like that to me. I can't take their case as a lawyer. I could never take that case. And yet what you are trying to do is to protect insurance agents and insurance companies when they do those things to people, and there's only \$500 damage, there's \$200 damage. Your firm's not going to take that case and your firm's not going to take that case.

JOSEPHSON: Not many lawyers will and if the DTPA is not then particularly encouraging and handling the small claims. What's partly happened in my experience is that because of the large dollar amounts you allow, the fact that it is not limited in the true consumer transactions, then a lot of the lawyers that have been doing those kind of cases are now basically personal injury lawyers and big time commercial lawyers making wonderful money in a very upscale DTPA litigation. And my view is the one I expressed before, is to try to make this a true consumer

statute and make sure that the small claims and the true consumer cases where people need lawyers are handled.

WOLENS: But you are hurting these people who are having their cars totaled because you are making this law tougher. And they may be making a good living but my hunch is that you folks are making a pretty good living, too at your, law firms.

[Background conversations]

WOLENS: But we are discussing here why not limit, why not bring some power. This law has been watered down and watered down because people come up here every two years watering this thing down. Why not beef it up the way Mr. Josephson was talking about, beef it up and make it mean something for certain consumer transactions less than a blank number of dollars. And you take care of people who have been abused by their insurance carriers, by their insurance agents, ??? for the three farmers who get together because they can't afford to buy a John Deere tractor on their own so three of them get together and pitch in \$25,000 a piece of \$30,000 a piece and they probably only put down \$5,000 a piece and had to go out and get a loan for the rest of it as a partnership, and all of a sudden they don't get the benefits of the Deceptive Trade Practice even though the agent for John Deere may have said some things that were not true. Why can't we do that, why does that offend you, why does that offend your association Mr. Josephson?

JOSEPHSON: It doesn't offend me personally.

WOLENS: Your association.

JOSEPHSON: Well, it's not my association, but I mean it's--

WOLENS: You are here to lobby for the association.

JOSEPHSON: Well, I'm here to speak on behalf of the bill, but they could be called something else and I'd still feel the way I feel. I don't disagree with what your saying. The problem is, and I mentioned it earlier, do you want to make that insurance company, do you want them to have a defense? What if they have another side of the story? I mean, under this current law they don't get to tell it all they have to prove -- and the question is do you want them to have another side? Do you want in return for toughening that law, that is to make it real easy to get that insurance company, that is to have some mechanism for getting that insurance company do you want the insurance company to have a defense or not?

WOLENS: It is your sworn testimony that that insurance company does not have a defense and does not have a way to defend itself?

JOSEPHSON: No, I'm saying right now it's a no fault standard. I'm saying if you are sold something and it turns out somebody sold you something they thought it was x, it turns out to be y, they are liable. Now, we may all think that's fine, but they are liable for that conduct. And what I'm saying is under this legislation it puts in a standard which requires that you prove at least they knew when they did it that they weren't being honest with you, that they weren't leveling with you. And I mean that's the only thing, that's the way I see this addition to that. As far as consumer transactions, in all honesty, when I came here my focus was intended to be why we should treat consumer transactions over here, and take everyone else where this statute had been misused in all of these other areas products liability or whatever it is, out and solve the problem, whether that's the way Representative Turner wants to do it or something else, solve the problem of the consumer transactions. Come up with something that fits the need that you gentlemen decide or ladies decide that is really that's the way we should go with that aspect of this bill. Whether that's including partnerships or whether it's limiting the focus or the dollar amount, those are things that you all have to decide.

WOLENS: Do you agree that there is a problem by excluding partnerships from this, the problems that he brought out to you about two guys or three guys getting together and putting

together some money. Don't you think that's a real live problem, and that these people who form a small partnership should be included, should have a remedy under this, and not be excluded as this bill does? What do you think Mr. Josephson, in your heart?

JOSEPHSON: I personally think it would be unfair if someone got tax advice and became a partnership to sell the tractors and then all of a sudden we change the bill. But I think the way to remedy that is to give everyone notice, and part of the attempt of this legislation I think should be to do that. That is I think right now we are talking about causes of action that accrue after a certain date in an effort to try to do that. I don't think that people should be unfairly caught in a catch-22 situation where they did something relying upon an accountant or someone else and lose money on the deal. I think that they should have an opportunity to get out from the conduct which has now been changed, just like you do with any law.

WOLENS: So perhaps make this apply to partnerships or whatever, all these things that are formed after the effective date of this act?

JOSEPHSON: And I think that they tried to do that; I don't what the current legislation did, but I think that there's been an attempt, and I'll have to look at that but I think there's been an attempt. Yes, the Act takes effect September 1 and applies only to a cause of action that accrues on or after that date. So basically--

WOLENS: So basically that is not responsive at all to my question.

JOSEPHSON: I thought it was.

WOLENS: My question was-- you just said a partnership, it should not apply to people who have gotten advice to form a partnership. And I asked you the question therefore does that mean that it should apply to partnerships or corporations that are formed after the effective date? Now you're saying that it should only apply--

JOSEPHSON: Oh, I'm sorry I misunderstood you; I did not understand what your question was.

WOLENS: If we had a partnership, and the partnership was created to do whatever, that Delwin was discussing, and they have done certain acts, isn't it fairer to have the supply to partnerships that are formed after the effective date?

JOSEPHSON: If you decide to limit the size of the transaction and you say you agree to \$500,000, and that's the route that you want to take, then my personal belief is if you applied it to partnerships or to small corporations I personally wouldn't have objections to that. But you're asking for my personal views; I gave them to you. To me the key is what amount, what dollar amount, that you are going to apply this legislation to. Are you going to apply it to-- and I think you'll see if you look at the various drafts of this legislation that in some of the earlier drafts it did apply to partnerships and it did apply to corporations, and the focus was-- but the amount, the \$500,000, ceiling was in place in all of the drafts. So I think people have gone around, and I think in all probability that the major reason there was a feeling that this bill should not apply to corporations or partnerships and perhaps the corporations people were thinking of were not the mom and pop corporations that the chairman or some of the others have described to us, but I think they were thinking of the larger corporations or the larger partnerships, and the purpose was to keep this a consumer bill. But I think you've got a point you've made it, and I think it's a good point.

WOLENS: I want to ask you about something else if I can that we have not discussed, and part of my doing that-- Curtis I am interested in hearing a response from the other side about insurance companies defending themselves and that angle, and perhaps you would consider when these gentlemen leave so we could hear something from the other side sort of respond and go back and forth it would help me a great deal in understanding this.

JOSEPHSON: I hate to-- Could I make one-- and I didn't mean to interrupt anybody. I sort of feel partially responsible for this, and I don't want to be-- I want at least ladies and gentlemen of the Committee to know that there are some 17 or 18 people out there who are at least waiting to speak on this side of the question. I don't mind staying as long as anybody wants me to stay and listening to the other side and then responding. I am more than happy to do it. In order to accommodate some of these people, would it be possible to have them, their testimony is like a minute or a minute and a half a piece.

SEIDLITS: We'll take that into consideration. Representative Ramsay has a question.

RAMSAY: Under the definition of professional, that would include real estate brokers, insurance agents, anybody that pays a fee for a license?

JOSEPHSON: Correct.

RAMSAY: So as a real estate broker, if I mislead someone that's buying a house and they are not an individual, then they're not protected by this bill? If I sell a piece of property to a corporation, they're not protected?

JOSEPHSON: They wouldn't be able to use this statute.

RAMSAY: But they would have another-- OK. And also the partnership that buys the John Deere tractor. Outside of this bill they have other protections, right or wrong?

JOSEPHSON: Absolutely, correct.

RAMSAY: Thank you.

JOSEPHSON: It's just where you want to put it.

WOLENS: It's different. But Tom, the way to go about it is different, and the recovery is different. It's totally different. And because it is different it affects whether or not they can get to a lawyer to do anything about it, and if a lawyer won't take the case then they will do nothing about it because, because nobody will. That's what has happened with Tom.

WOLENS: I wanted to ask a question if I could about mediation. We have not discussed mediation.

SEIDLITS: Let Carter go first, Steve. Representative Carter.

CARTER: Steve, I hate to get into this when you are getting warmed up.

WOLENS: No, no, I'll remember it.

CARTER: When you talk about the insurance end of the deal, having been in the insurance business for the last 45 years, and I think I've had most general experiences. But I think you'll find that in most instances when people say that they're not properly reimbursed for, say, an automobile, a physical asset that they have in a lot of instances an inflated idea about what that asset is worth on the market, the insurance policy is dealing with market price. And now when you get into bodily injury and some of those areas, you know, there can be a lot of room for argument. But in most instances the only time you ever have any problem settling a claim is when somebody is expecting, you know, the moon.

WOLENS: And for those instances, I'm totally on your side, I'm totally on your program. But as a lawyer, and I don't take these cases and I've never taken these cases, I don't take them and if I did I wouldn't even make as much money as that man is who is probably complaining for as much money as these guys over here earn. But the problem, and this is my experience from a month ago, where the insurance company in making an offer to the insured, who was someone who I

know who only speaks Spanish, the company treated them as morons and they refused on a total to offer them their taxes, the taxes they paid. They refused to pay for the license plates that these people had paid for for their brand new car, refused to do it. I'm not talking about the value of the car; I'm just talking about all these other things, because they were Mexicans in the minds of this insurance company and they are not going to pay the Mexicans for it. Now what do the Mexicans do then? Well what most of the Mexicans are generally going to do is they are going to do -- is with the variation of what Debra would say -- they are just not going to get their money. They are going to get ripped off for a couple of hundred dollars, nothing major. And these people go to their insurance, to their agent and say "would you please cancel my policy for me, you so I don't have a car anymore I don't have my car why should I have my policy?" and they say "no, no; you'll have to talk to the insurance company, the carrier." The agent says go talk to the carrier. And it is just terrible; it's egregious. And I'm talking about those and I want the DTPA to apply to that not to the value, because you are right about the value, but I'm not discussing the value of the car as being the issue. It's the taking advantage of people for small ticket items.

CARTER: Well, we can't keep people from doing bad business practices, but I just wanted to make it clear that in most instances, and I think you could find people who will testify, if it goes far enough that it actually winds up in the courthouse, then probably 85-90% of the cases that are ever tried, you know, the last offered settlement than what the courts give. So it's not totally a one-way street.

WOLENS: And I agree; I agree.

SEIDLITS: Somebody else had a question. Representative Hochberg.

HOCHBERG: Briefly, I'm going to learn in this Committee never to yield the floor. I yielded about half hour ago. I just want to clarify one small thing back in the discussion we had on knowingly and intentionally. And I stopped because when you said something I looked at the bill, and I can't find what it was that I thought you told me. What I thought you told me was we've created a new definition of intentionally that's sort of like what we used to have as knowingly, and then we changed knowingly to be something else. I'm looking at knowingly and it looks--

JOSEPHSON: Knowingly is very similar to the way it was.

HOCHBERG: I mean no substantive of change at all, really.

JOSEPHSON: Pretty much the same. But what we're saying is, what that substitution is about, do you want to have, in this consumer transaction, do you want somebody to actually-- do you want to require the plaintiff to prove that that person knew that what he said was false or knew that what he said was misleading, and that's the addition. Right now he doesn't have to. He just has to show he represented the consumer says he told me A it turned out to be B; I was damaged. Now we're saying consumer says he told me A, the guy says I told him B but I thought it was A, and that--

HOCHBERG: I've got to prove what you thought.

JOSEPHSON: No, you've got to prove that what I said I said that was false, that it was false and I knew that it was false at the time I said it.

HOCHBERG: That you knew it was false and that you intentionally said it to mislead me in order to get punitives.

JOSEPHSON: No, now we're off to the punitives. We're saying to get more than actual damages or economic loss, which Representative Turner-- and I say is actual damages minus mental anguish -- economic loss is actual damages minus mental anguish. In order to get more than that, you have to show that somebody acted intentionally, because you're asking for punitive damages; you're now moving up the ladder of conduct to punish somebody and deter others from doing it again.

HOCHBERG: Not just that they acted intentionally, because that's sort of like the knowingly standard, but that they acted intentionally with the intent of having the consumer rely on the misleading; not just that they put that false information out and that they knew that they put the false information out and that they thought that a consumer might pick up on that false information, but it was their intent to confuse that particular consumer.

JOSEPHSON: Sure. But, you've met that element because the two of them had transactions or if I read it and he put it out for the public to see you've met that element of the punitive of the intentional aspect. Because obviously, that's something that I think it's probably the other part that it was intentional that's the harder part to prove. I think the part that he put it out to be relied on is probably the easier part to prove.

SEIDLITS: Representative Danburg. We are going to try to wrap it up with these two in just a second.

DANBURG: Currently you can get actual damages proposing getting your standard approved better and better for Texas; that it be changed to economic damage. Actual damages caused by the wrongful conduct includes damages for personal injury, death, mental anguish. Economic damages is compensatory damages for pecuniary loss including cost of repair or replacement, but it doesn't include exemplary damages, damages for physical pain, mental anguish, loss of ???, loss to society, loss of companionship, those sorts of things. So, say a child, somebody who doesn't have an earnings to loose, a child is killed by a malfunctioning garage door opener. OK, fairly common case.

SEIDLITS: You've still got to get them under products, strict liability.

DANBURG: If the son is killed, he doesn't go to the hospital very long, there's not a big hospital bill. He didn't have any income there's not a pecuniary loss in that kind of way. I mean basically, once you've buried him that's the end of the pecuniary loss. What y'all are proposing is that she should get nothing for pain and anguish, nothing for mental suffering, nothing for loss of companionship, nothing for loss of ???, but you will give her a new garage door opener.

JOSEPHSON: No, what we're saying is this has no business being under the DTPA because there are so many absolutely good remedies out there under strict liability for negligence which will provide every single thing that you itemized, and you shouldn't be doing it under a consumer--

[end of Tape 2, Side A]

[Tape 3, Side B]

JOSEPHSON: Larry York is behind me. Larry is one of the negotiators who has been involved in the negotiations on this. He will be available to answer questions.

SEIDLITS: OK, we're going to ask one more question and then will trade out. Steve had a question about mediation. Go ahead, Steve.

WOLENS: I wanted to ask you about mandatory mediation. Where else in Texas law is there mandatory mediation?

JOSEPHSON: In Texas law? Mandatory mediation. I can't think of another of a specific statute. There may be some out there; I'll have to take that-- I haven't thought about it in terms of-- I will tell you this that in many of the metropolitan areas the courts are requiring us to participate in mandatory mediation on virtually every case that goes before the judge and before trial setting.

WOLENS: Discretionary with the judge?

JOSEPHSON: Yes. The lawyers can object but they don't get very far.

WOLENS: I understand. Perhaps I should ask this question. Where in Texas law is mediation mandatory?

JOSEPHSON: What I'm saying to you I'm not sure that mediation, that I'm aware of any statutes where mediation has been made mandatory.

WOLENS: So this may be the first time that we are requiring statutory remediation.

JOSEPHSON: Yes, I think you're right.

WOLENS: Now let me ask you something else. If the DTPA is a cause of action along with another cause of action, for example breach of contract, or breach of an implied warranty, does the DTPA cause of action go to mandatory mediation and you set aside the implied warranty, or does it bring everything along to mediation?

JOSEPHSON: Well, you've got the warranty already covered by the DTPA.

WOLENS: OK. Let's say contract.

JOSEPHSON: OK. No I don't know the answer to that. I would assume that the answer would be that you shouldn't just be mediating your DTPA cause of action, but you should be mediating your entire cause of action. I can't conceive that someone-- if you had a breach of contract cause of action and legitimate consumer transaction and you had a cause of action under breach of contract and a DTPA claim and a breach of warranty claim under the DTPA, I would assume that you would want to resolve all of those at one time.

WOLENS: I understand what you might want. I'm just curious what you intend the law to say. Do you intend this to say that all of it gets mediated? If there were other causes of action does it all get mediated?

JOSEPHSON: If Mr. York could address that. I don't know, to be perfectly honest.

WOLENS: That's fair.

JOSEPHSON: My own view would be that you would want to try to mediate all of the case at one time.

WOLENS: Do you contemplate that it be binding mediation or not binding mediation?

JOSEPHSON: I would contemplate that it would be non-binding mediation, in the traditional sense that a consumer ought to be able to say no, just like a defendant ought to be able to say no, just like we have now under mediation.

WOLENS: But it seems to me that not only are we changing remedies for consumers under the Deceptive Trade Practices Act and limiting the people who can sue under the deceptive trade practices by redefining the term consumer, but we are placing a new procedural and expensive hurdle in their way, which is mandatory mediation that may not resolve the issues.

JOSEPHSON: Let me tell you why I think it answers-- why again it was not intended to do what you may believe it does. What it was intended to do was exactly the opposite, and that is to answer your question about why is somebody going to want to be involved in this case if there's only \$500 or \$1,000 and that might be involved in it for a couple of years. From the standpoint of defendants, if I can settle that case, and we have to mediate and we have to face the fact that here is a mediation and we've got to decide the issues now, I think that more cases will settle and not less. That would be my own view. So it really wasn't put in to create another hurdle, as I understood it.

WOLENS: I don't know very much about mediation, although I am learning about it now. Would you tell everybody what it costs to get a mediator, because I think, I'm just shocked with just how much money that parties can spend getting a mediator. Isn't it \$400 an hour, \$500 an hour?

JOSEPHSON: No, no, no. There may be some people who do that, but by and large the average price of mediations will range anywhere from a few hundred dollars to a few thousand dollars, perhaps more in the very complicated cases. I mean some mediation take days and days and days, and you might run up \$25,000 you might run up \$4,000 or \$5,000 a day. But in the kind of mediation you're talking about here, you're talking about essentially the time of an attorney for a few hours.

WOLENS: And what does an attorney charge as a mediator per hour?

JOSEPHSON: Anywhere from \$150 all the way up to \$300 an hour in a typical kind of mediation.

WOLENS: Now, how does the consumer pay-- that's what the consumer and the defendant pay. They have to split that, is that how that generally goes?

JOSEPHSON: Well, typically in a negotiated mediation, the way it typically happens just like the defendant many times has to pay attorneys fees as you're aware, the defendant in most instances picks up the cost of mediation, too, if the case is settled. It's not a mandatory thing, but obviously one of the negotiating points of view as a plaintiff's attorney if you were on the other side being the plaintiff's attorney, you're going to say I agree we settle our case for \$400, but I'm not going to be saddled with the \$300 mediation bill; you've got to pay that.

WOLENS: Now, I am more often, personally I am more often a defendant in a DTPA than I am a plaintiff.

JOSEPHSON: OK, well I was just using this as an example.

WOLENS: And as a defense attorney, which I have been many times in a DTPA, I would think to myself "lets go force them to go to mediation, because the plaintiff's lawyer is going to have to get paid, and how is that consumer ever going to afford paying the plaintiff's lawyer for his time in doing this." I am going to assume that he's not going to get paid at all; that he's going to hate being there and certainly not want to pay any of the money. And I think that as a defense lawyer that I'd be thinking to myself that they're going to be happy for me to pick up the \$300 per hour for the mediator to get it resolved. Do you not agree with me, would you not think that as a defense lawyer?

JOSEPHSON: I can tell you that when this language was drafted it was to try to resolve these claims early. And in all truthfulness it was to take these claims that we don't want in the court system if they can be resolved early to try to get them resolved, and if they can't to make an early determination that they can't be resolved.

WOLENS: Why not require remediation after the notice? Would you do that, or do you want people to hire lawyers first?

JOSEPHSON: No, I don't want people to hire lawyers. What I want, when the 60 day notice comes, if it's a transaction, I would want to try to resolve the claim. If the parties can't get together and resolve the claim, then the next question is when does mediation come in if you have mandatory mediation. Do you want to really go out and do some discovery, or do you really want to-- Maybe the defendant didn't give serious consideration to the settlement offer, maybe the plaintiff didn't give really serious consideration to how much his claim was really worth. Do you really want to drag this thing out and take depositions, clog up the courts or do you want to give them the mediation?

WOLENS: I hear you, I'm just asking procedurally is there a due process problem if we're going to statutorily require it, which seems to feel funny from a due process, but I'm sure you've researched that and that there's no constitutional issue with a mandatory mediation. Assuming that, could you not statutorily require mediation after the notice and before a suit's final?

JOSEPHSON: Sure, yes, but you are still going to have the problems that you mentioned that are attendant.

WOLENS: No, I understand.

JOSEPHSON: Again, you could have client and client involved. If you send out that DTPA notice, you don't have to have lawyers. You can set up a procedure with client and client if they want to do it.

YORK: Mr. Wolens, I'm going to just add one comment. At least in Harris County we have a very active public dispute resolution center where you can get mediators for free who volunteer lawyers and lay mediators. I believe that's also true in Dallas. That was all set up with public funds, I'm going back to the Dispute Resolution Act of 1987.

WOLENS: I find that interesting, and if you could perhaps tell me afterwards if that is available in Dallas and who is offering that service for free. I would just be very interested in knowing that. Thank you.

JOSEPHSON: Firms volunteer lawyers. We're asked to volunteer lawyers, other firms on both sides are asked to volunteer lawyers, and they meet so many nights a week, and they take small claims like this and they mediate them and try to resolve the claims. I mean, that's what I think you had in mind. And that's a good point I had forgotten about that. But if you're really talking about claims the size we were talking about earlier --

WOLENS: I appreciate your stamina, your staying on your feet this long, and I'm curious are you related to Fred Josephson?

JOSEPHSON: No, but I might be.

SEIDLITS: This is the absolute last question. In a common law fraud case is knowledge required as an element of proof for a cause of action?

JOSEPHSON: Yes, knowledge and intent.

SEIDLITS: OK. Any more questions? Thank you all.

WOLENS: Curtis, I would like to renew my request. I would enjoy listening to someone from the other side to respond in the meeting part of it, and then perhaps take people who wanted to do testimonials.

SEIDLITS: Sounds all right to me. We are going to depart in just a little bit. On those who are against the bill, is there an Ashley Smith of that side? Ashley Longley. Why don't you bring out whoever you want to, Bill Bragg or somebody. Have y'all signed in?

LONGLEY: We have Mr. Chairman, Members of the Committee I'm Joe Longley I'm here representing myself as well as the Texas Trial Lawyers Association, as we have been active in some of the negotiations we've been talking about. I think Mr. Maxwell is going to join me up here who is also my law partner. We've both been former chiefs of the anti trust and consumer protection division; we've both been former chairmen of the consumer law section of the State Bar of Texas, just as Mr. Sheehan has been. We have other resource witnesses here as well who have also held those posts and would be happy to try to answer any questions. I have prepared a side by side analysis for the Committee and I gave it to the Committee Clerk earlier. I don't know if it got passed out. What this side by side does is, the first column is the current Deceptive

Consumer Protection Act and its provisions; the next column are the proposed changes with the Committee substitute -- this is not the original bill of House Bill 668; this is the Committee substitute that was laid out before you this evening. The next column is the effects of the changes. The last column shows you the cases that have developed over the years interpreting the Consumer Protection Act, and gives you the kind of conduct that was egregious conduct that victimized consumers that would now be OK if this bill were to pass.

SEIDLITS: Joe, would you agree with me that the DTPA law has been expanded since its inception in 1973?

LONGLEY: Yes. It was expanded in 1975 to include partnerships and corporations, again in 1977 to include political subdivisions as consumers.

SEIDLITS: So the statement has been made that the law has moved in one direction. Would that be a fair statement?

LONGLEY: Well, up until that time the definition of consumer was expanded. After that time it contracted. And slowly as you know, anyone with assets in excess of \$25 million cannot be a consumer, business consumers with \$5 million in assets or more can agree to take themselves out of the act. These are all provisions that were tort reform of another era, but they have since contracted the definition of consumer with regard to those matters, put in defenses that were not there originally, treated personal injury, property damage, and death as every other personal injury, property damage, or death case is treated under Chapters 33 and 41 of the Sub Practices and Remedies Code. That was done in 1989 so plug the so-called loophole whereby you could bring a products case or some type of personal injury case onto the Deceptive Trade Practices Act and disguise it and not be subject to some of those defenses. So now all that's been done in past years. I might add that the original intent -- you hear a lot about the original intent, and I was there at the creation. I testified at every Committee hearing that was held in 1973, and we brought along some of the Committee testimony if the Committee is interested. But one thing about the original intent is that businesses were always part of the Deceptive Trade Practice Act as plaintiffs, small businesses. Senator Snelson on the floor of the Senate amended House Bill 417 to include businesses, and this would be individual proprietorships at the time, to add those folks as consumers. And indeed that was something that it unanimously passed. There was not one nay vote against that, because the idea behind the Consumer Protection Act was to focus on the conduct. In other words, it's not anti-business, it was anti-deception, it was anti-fraud, anti-unconscionable conduct. That was what was focused on in the DTPA. In 1975 the business community recognized there was a distinction between sole proprietorships being able to sue, but if you were a partnership or corporation you could not. There was no logical reason that just the form of the business association would somehow prevent businesses from using the act. In 1977 political subdivisions obviously saw the same thing. The Committee substitute that's laid out before this Committee for your consideration is not only anti-consumer in the ways that you've already heard, it's not only anti business in the ways you've already heard by not allowing businesses to utilize the provisions of the Consumer Protection Act, it's also anti taxpayer. The reason it's anti taxpayer is because political subdivisions, your school districts and your districts, your utility districts, your counties, your cities, where they can use the Deceptive Trade Practice Act and the Consumer Protection Act now to get back tax dollars that have been unlawfully taken through these prohibited provisions will no longer be able to use this Act. Taxpayers will not have these protections.

WOLENS: Well what's an example?

LONGLEY: An example is the City of Garland, a reported case two weeks ago. City of Garland sued lawyer and engineers with regard to some utility bonds that were floated up there. Deceptive trade practices were alleged, and they recovered under the Deceptive Trade Practice Act.

WOLENS: What was the deceptive act that they found, the jury found?

LONGLEY: Misrepresentation.

WOLENS: What kind of misrepresentation?

LONGLEY: I don't recall the exact misrepresentation, but it's a reported case at the Dallas Court of Appeals two weeks ago. That case could not be brought as a deceptive trade practice case by that political subdivision if this particular substitute was to pass.

WOLENS: Could they bring it somewhere else?

LONGLEY: Sure, anybody can bring a case anywhere else. you can sue the Bishop of Boston for bastardry for the price of filing a lawsuit.

SEIDLITS: I think what he's asking is other causes of action such as negligence, misrepresentation, in trying to distinguish for Members of the Committee what the difference in the burden of proof would be under the scenario that you described on a DTPA claim and the alternative causes of action. Say it was negligent misrepresentation or malpractice or whatever it is.

LONGLEY: There are other causes of action that anyone could bring under the Deceptive Trade Practice Act.

SEIDLITS: OK, well let's go back to the City of Garland, since you bring that up.

LONGLEY: The City of Garland could have brought breach of contract; I suppose they could have brought--

SEIDLITS: OK, on breach of contract what can you recover under breach of contract?

LONGLEY: You could recover your actual damages, you could not recover certain consequential and incidental damages without further showings of foreseeability, for instance. In other words you're very limited in what you could recover under breach of contract. For instance if it was, and there's other cases, for instance there was a dam that was built out on the I believe it was the Guadalupe River, the lower Guadalupe River Authority.

SEIDLITS: Did it bust and there's consequential damages, OK?

LONGLEY: There were consequential damages that flowed from that. But breach of contract limits the kinds of remedies you have, and it also you can stack in choice of law provisions, venue provisions--

SEIDLITS: Because it being a negotiated contract?

LONGLEY: It would be a negotiated contract.

SEIDLITS: OK. What else?

LONGLEY: You could sue for negligence I suppose. Negligence, again negligence does not allow you to recover your attorneys fees without there being a showing of something that would involve punitive damages, and then you could possibly recover attorneys fees as punitive damages if the trier of fact decided that was something that would be appropriate and you reach that higher level of culpability that you would have to show to get punitive damages.

SEIDLITS: Some type of intentional misrepresentation, fraud?

LONGLEY: Fraud would be another example of the City of Garland's situation. The Deceptive Trade Practices Act, though, focuses on the conduct of the alleged wrongdoer. There are many, many defenses.

SEIDLITS: Tell us why as a lawyer that you would not want to go-- DTPA was thrown out, OK, and under this bill you say that won't work. What's the advantage of the DTPA over these other areas, other than just of the damage equations that we're talking about?

LONGLEY: The types of remedies that are available?

SEIDLITS: There have been allegations, and it may be true I don't know, that it's almost a strict liability type finding under the DTPA as opposed to negligent misrepresentation or intentional fraud, you have to show ABCDE and F. You know, there's certain elements. What's your opinion on that?

LONGLEY: Well my opinion is that it is not a strict liability type statute. You still have defenses to the Deceptive Trade Practices Act. The Deceptive Trade Practices Act was the first law in 1973 to put a frivolous lawsuit groundless claim provision in there for someone who might abuse the statute. We've defended cases where we have made that stick; we have actually got attorneys fees against plaintiffs who have brought frivolous lawsuits under the Deceptive Trade Practices Act. It was the first act that put caps on punitive damages that I know of in the State of Texas. Three times actual damages are caps they're not mandatory any more since 1979; they are a cap on punitive damages. Hence you have these protections in the DTPA for honest legitimate professionals and business people, and at the same time you have defenses that are not available in other areas of the common law or other statutes. Hence, we feel that to arbitrarily to take the consumer and limit the consumer's rights, take businesses completely out as consumers, and take political subdivisions completely out as a consumer, is not a good thing for Texas. In fact, we have a thriving economy in Texas, and one of the reasons we have a thriving economy is because we have a clean marketplace. We don't have these fly-by-night people coming to Texas because they know the certainty of what will happen.

JOSEPHSON: There are a lot of folks that are signed up here to testify and a lot of people that have come to me in various type of businesses and they've expressed to me that there is a genuine concern and a fear that under DTPA they're exposed in a manner to which they think is unfair. So somebody in the litigation world has impressed upon them there is unfairness in this bill, and the allegations have been made, and in some cases rightfully so, that they're dragged into a lawsuit and exposed to a claim where they just can't take the chance in front of the jury, or because of the DTPA it's an easier road to get there rather than these other causes of action that we've talked about here. What's your response to that?

LONGLEY: My response to that is that that's not the case, that's not reality. They--

JOSEPHSON: I mean, there's a tremendous perception or we wouldn't have 32, I don't know how many there are, 35 folks from different groups that are up here. Why is that?

LONGLEY: Well I can answer it way. I'll dare say you don't find any of those witness cards that are from car dealers, or from retailers, and the reason you don't find any of those is because car dealers and retailers don't have any trouble, and they're the people that are on the line every day with the Deceptive Trade Practices Act. They don't have any problem functioning under the Deceptive Trade Practices Act. Gene Fondern [?] with the car dealers, Jack Wilts [?] with the retailers, have long stated that the Deceptive Trade Practices Act is something that works and works well and it works well for them when they are plaintiffs. When they are dealing with contracts of adhesion from their suppliers or their manufacturers up the line the Deceptive Trade Practices Act provides comfort and protection to those folks.

SEIDLITS: Now why does it provide comfort and protection for those two groups and not the other groups that I hear from on a daily basis?

LONGLEY: Well, it does provide comfort and protection to those groups too, but I don't know how often they use the act. I don't know how often realtors use the act. I represent a lot of realtors; they do use the act when they come to my office. I don't know if they know it's out there

as a vehicle for when they get defrauded or when they have unconscionable actions practiced upon them. But certainly the car dealers and retailers will.

SEIDLITS: And these other groups that have come to me, it's not from a plaintiffs prospective it's not from their use of it as a proactive type or piece of legislation or a statute, but it's in a defensive posture, that they believe that it exposes them to greater liability, greater damages, and they believe that it's bad.

LONGLEY: Well, that's a belief that I can't dispel by saying that ain't so I suppose, because they are going to believe who they want to believe and I'm sure choose not to believe me. But I represent lots of folks--

SEIDLITS: Go into the defendants shoes for a little bit. Would you be more inclined to urge your client to settle a lawsuit if a DTPA cause of action is thrown in there? Does it give you a greater apprehension, does it give you a greater concern and move you towards "well, we'd better pay this because under DTPA it's easier to recover than under fraud or misrepresentation or one of these common law"?

LONGLEY: Absolutely not. If I feel the claim is not legitimate, and I defend these cases from time to time, I tell my client that and I tell them if I think it's a defensible claim. And I go and defend the case if that's what they want me to do. And I've done so successfully. In fairness I've also done so unsuccessfully, but there aren't too many lawyers around that win all their cases.

SEIDLITS: Would you tell me what if I come in, I'm an engineer in a situation, and I can't think of a good facts situation right now, but a professional in it, and it's not necessarily an opinion that was given but it's the defect in the dam or whatever. Now what type of defenses would you tell me that I have under the DTPA that are over or above or less than those defenses that I might have under a common law remedy?

LONGLEY: Well, you've got defenses of actually telling the consumer that if you're getting information that's supplied from another source, such as the seller or governmental entity, that you're just merely passing the information along, that's in the defenses section of the Deceptive Trade Practices Act right now. That's not a defense in common law in some area, it's not a defense for fraud. It's not a defense to breach of contract unless that's written into the contract. But you have a litany of defenses that have been written into the DTPA that are not defenses to some of these other actions. Now conversely, the DTPA can act as a stop sign type statute in a strict liability sense where you have one of the laundry list items that's violated, such as rolling back the odometer. If my automobile shows 20,000 miles and the car dealer represents to me that's the actual mileage and it's really got 120,000 miles, you've run the stop sign, you're going to be liable in that situation. Now unless you can show that he did that knowingly you are not going to get any extra damages, but at least you get your money back, at least you get your actual damages. That's the kind of thing we were talking about earlier. This particular proposal will take that kind of remedy away from just everyday consumers, regardless of whether they are business or mom and pop's or whoever.

SEIDLITS: This knowingly provision?

LONGLEY: The knowingly provision, because it requires you to step it up and show knowingly just to get your economic loss. You could no longer get your actual damages because they changed the definition of actual damages to exclude certain elements of damages. So, that's one of the problems with the bill. The bill basically has a litany of things that just totally-- basically this is a neutron act. The name Consumer Protection Deceptive Trade Practices Act is still there, but the remedies and the rights are gone is what happens with this particular proposal. They're gone for businesses, they're gone for political subdivisions and taxpayers, and they're gone for everyday consumers. They're gone in a number of ways. The insurance provisions are especially egregious in that they repeal sections of the insurance code that even allow the Attorney General to sue insurance companies. Not just people who have insurance problems, but the Attorney General of the state who is charged with the duty of enforcing these insurance laws. I don't think

that's an intended result because that was not in the original bill; this was not in House Bill 668 as it was introduced. It showed up first in the substitute. So that's just something that's there.

There are many, many provisions of the substitute that take away rights of consumers, take away rights of businesses as consumers, and take away rights of political subdivisions as consumers. I think you have all seen that, you've probably got bill analysis. Certainly we have given you the case citations by name and by conduct that would be eliminated as actionable if this bill were to pass, and that's the problem.

SEIDLITS: Representative Black has a question.

LONGLEY: Yes sir.

BLACK: Would all these cases have any way to be-- can you still access the court with these kind of cases, or are we just totally saying what if? Some of these are pretty big deals. Have we still got a way to deal with these or not?

LONGLEY: You've got other causes of action that could possibly deal with them, such as breach of contract, negligence and fraud.

BLACK: Just go down the list and tell me the ones that we don't have an access course, we can't do anything with them.

LONGLEY: Well, the ones that you would have the most problems with would be the unconscionability cases, because unconscionability is a theory that doesn't really fit into these other categories; possibly fraud. For instance Debakey v. Staggs was a case where a lawyer stole \$400 from the client to do an adoption and didn't do it. That was brought as an unconscionability case that they simply stole the money. Now that might work as a conversion case, but where you have simple overcharging, like in the infant formula cases which Mr. Maxwell can talk to you about, I know you had the breast-feeding bill that was up previously, but where you don't have breast-feeding you've got infant formula and price fixing and what has been alleged by the Attorney General as well as private consumers as egregious overcharging in the WIC programs, unconscionable overcharges -- that might not be reached anywhere if this bill were to pass.

SEIDLITS: Representative Ramsay has a question.

RAMSAY: Mr. Chairman, I'm sorry sir, what was your last name?

LONGLEY: Longley.

RAMSAY: Mr. Longley, you mentioned a while ago that this bill has to do with whether or not someone is wronged knowingly or unknowingly, did you not?

LONGLEY: The current law deals with both. If you deal in an unknowing violation you just have to pay the actual damages. If you deal in a knowing violation it can be enhanced.

RAMSAY: In the new bill it throws out unknowingly?

LONGLEY: As far as the laundry list of taboos, that's correct. You would have to show that they knowingly engaged in those just to get you economic.

RAMSAY: All right, so, I'm not a lawyer, and that's probably obvious. Why would you as just a juror, not a lawyer, think that someone who unknowingly wronged somebody under the old law would be responsible?

LONGLEY: Well, as between a completely innocent person who didn't engage in any misrepresentation either knowing or unknowing, that would be the consumer. Where does the burden of economic loss fall? Does it fall upon the person who is completely innocent, or on the person who engaged in the misrepresentation even though they didn't know they were? That's the

question. The DTPA answered that question that the victim at least gets actual damages, even though you might not get more you at least get that much because you were totally innocent. You were the victim of the misrepresentation.

YORK: Mr. Ramsay, let me see if I can get to the this. The courts have held that if a person makes a representation in the sale of a good or service they have a very simple duty and the duty is to know whether or not what they are saying is correct. They always have the choice of making no representation at all. But as between a person who has the good or service to sell who knows about it and the consumer who has no knowledge of the good or service, the issue is where shall the risk of laws fall.

RAMSAY: I understand that. If that's the case then it's covered under the new law.

YORK: Absolutely not, because the consumer is obliged to show that the misrepresentation was made knowingly in order to get his actual damages.

LONGLEY: The standard changes.

YORK: That's what I was trying to say, Rep. Ramsay.

LONGLEY: One more point about the original intent--

SEIDLITS: I'm sorry. Representative Carter.

CARTER: I'd like to go back to what I thought I heard you say a while ago, and I may not have heard exactly as you meant it. You said something about if a person came to you and had an action that you didn't think was a good action, you would tell him so.

LONGLEY: Correct.

CARTER: And then did you also say but if they insisted you would go ahead and file it, sometimes you ???

LONGLEY: No, sir. I was talking about defending when I was representing a defendant who was being sued, that if I felt like that they had a defensible action and that the claim that was being made against them was not legitimate I would tell them so, and if they wanted me to go ahead and defend it I would. You try to give them as I said your professional opinion, by the way which I think professional opinions are not actionable under the current law, but that was the context in which I was talking about, not as a plaintiff but as a defendant.

CARTER: What did you just say about professional opinions?

LONGLEY: About professional opinions, I wanted to point one thing out. On April 10, 1973, and I brought the transcript from the House debate. The original intent of this bill was to cover all professionals for false, misleading, and deceptive practices, particularly in the advertising express representation or express warranty area. An amendment to the bill was sent up which said: "no provision of this act shall apply to any individual licensed by the State of Texas to practice a recognized profession in this state." This is in the original intent. The sponsor of the bill at that time said, "Mr. Speaker and Members I've heard of a license to steal, but this is the first time I've ever seen it offered as amendment to a bill." Just think for a minute now what this says, that if you have a license, if you are engaged in any profession licensed by the state, then you cannot be held accountable for fraud, for misleading advertising, for turning a speedometer back, for passing off old merchandise as new merchandise, for just simply lying on advertising, and we have several professions licensed by this state that are authorized to advertise, and I think they ought to be accountable. Bear in mind this was three years before lawyers were allowed to advertise. Three years before lawyers were allowed to advertise. We know now what the results have been of lawyers advertising.

SEIDLITS: But they were accountable under other theories. If that amendment had passed they would have been accountable under other theories in law. Is that correct?

LONGLEY: Other theories of law, such as breach of contract, fraud, and possibly negligence. The whole idea behind the Deceptive Trade Practices Consumer Protection Act was to take all these centuries of defenses and obstacles that had been built up that prevented people from seeking their rights and from gaining redress and to put it into one place so that everybody knew what the rules were, and everybody could play through one set of rules. It's worked well through these intervening 22 years, even though it's been amended, as I believe Mr. Sheehan, said almost every session of the legislature. There's been some fine tuning. The last two sessions I believe were the exception where there were not any major amendments to the DTPA, but otherwise it's worked and it's worked well. The last major amendments were 1989 when personal injury, death, and property damage were all treated under Chapters 33 and 41, therefore it made them the same as any other personal injury case. This particular proposal would take personal injury, death, and property damage completely out of the DTPA. So the child who was killed by the garage door malfunctioning, even though it had been represented as being completely safe by the seller, well known retailer, that case would no longer be actionable under the DTPA.

SEIDLITS: Against Sears.

LONGLEY: Against Sears, and it happened--

SEIDLITS: The manufacturer would still be-- you could still hold an action against the manufacturer, and if Sears had any part I guess in the installation of it then you could still hold them actionable.

LONGLEY: Or through a products liability type theory, you still would. But even under the DTPA there would be no difference now, because Chapters 33 and 41 were made applicable to the DTPA by this legislature in 1989.

SEIDLITS: Representative Hochberg.

HOCHBERG: I'd just like to ask a question about that case. Why is that a deceptive trade practice?

LONGLEY: Because of the way the garage doors were misrepresented and the safety.

HOCHBERG: They were represented as not being--

LONGLEY: As having a kill switch, not in the literal sense, because that's what actually happened, but to shut it off if there was some type of a malfunction or if some obstacle got in the way to stop the garage door at that point.

HOCHBERG: But as it's described here, the door malfunctioned, right?

LONGLEY: Right, it kept coming down on the child.

HOCHBERG: It did not have a kill switch?

LONGLEY: Well, it did not work as it represented. It came down on the child's head and neck and choked the child.

HOCHBERG: It failed.

LONGLEY: It did.

HOCHBERG: OK, but it did have a kill switch on it?

LONGLEY: Well, it was represented as having one; whether it did or not I don't know. But it was a misrepresentation type proceeding where they said something that was not true -- what they said that was not true resulted in being a producing cause of a wrongful death.

HOCHBERG: Maybe I need to look at the case. It looks to me from the description here that what they said was true in terms of them providing a safety mechanism, but that the safety mechanism didn't work.

LONGLEY: I can't answer that distinction.

HOCHBERG: If that were the case, would you still see it as a deceptive trade practice or would you see it as a faulty product.

LONGLEY: It could be a faulty product, it could be a breach of warranty, which likewise is actionable under the Consumer Protection Act. But the remedies would be the same after the application of Chapters 33 and 41. You don't get any extra remedies after the passage of the 1980 amendments to the Deceptive Trade Practices Act.

YORK: Rep. Hochberg, the Texas Supreme Court analyzed that particular problem several years ago. The defendants were arguing that the reason for the failure was important in determining DTPA liability. The defendant argued that the source of the misrepresentation had to be in the design, interestingly taking a different view than what you were taking rather than simply being in bad repair. A little bit different juxtaposition. But the Supreme Court focused on what the statute focused on and since that is immaterial because, and these are the words of the Supreme Court of Texas, "the injury to the consumer is the same." How it failed, why it failed, is not important, when it's represented to perform in a certain way and it does not.

HOCHBERG: But the question is what was the trade practice that was deceptive.

YORK: If I represent to you that your automobile is safe in all accidents, if I represent to you that the garage door will not hurt or harm a child because it has a kill switch where it will bounce back up when it's met with some impediment, if I represent to you anything that turns out to be false, deceptive, or misleading you are entitled to recover.

JOSEPHSON: At least your actual damages.

LONGLEY: If you can show it was knowingly misrepresented, then you go into the realm of being able to recover additional damages up to a cap of three times.

HOCHBERG: To get the actual damages you don't need DTPA to do that right, or do you?

LONGLEY: Not under those circumstances, and that's the same for anything.

SEIDLITS: When you get a negligent misrepresentation under products case--

LONGLEY: You can name any good or service and you're going to be able to find other causes of action that will apply to those goods and services, or the types of injury.

HOCHBERG: With the same remedies, right?

LONGLEY: The same remedies generally speaking, except for attorneys fees. Breach of contract you have attorneys fees; you do not in the other common law remedies.

HOCHBERG: So is the only difference, because I think Tom was asking, it was being discussed I think it was Bill Carter that was saying something like there are still other remedies out there, there are other causes of action, and your answer was yes. And then you said that the one thing about the DTPA is that it consolidates them all in one section. And I don't find that persuasive, because it doesn't make any difference in my mind whether we consolidated them in one spot or

not. Therefore, I go back, is it your position that by eliminating the DTPA that every theory to sue somebody is still intact, and every remedy that's available under the Deceptive Trade Practices Act is still intact?

LONGLEY: Not under the DTPA. If this bill passes, the causes of action and remedies will be done away with under the DTPA.

JOSEPHSON: But will it still exist in other remedies.

LONGLEY: Yes.

JOSEPHSON: The same ones still exist?

LONGLEY: No.

SEIDLITS: There's another vehicle.

LONGLEY: There's another vehicle to get there, and the remedies may be different, but there are other causes of action that may apply to the same kind of conduct.

HOCHBERG: But let me ask you a specific question. If I as a real estate broker inadvertently mislead a client as to the square footage, because I actually believe that I am telling him the truth, and this bill that we are discussing tonight is passed, then I am more protected as the real estate broker under what the law is that's left, because it's not a deceptive trade practice that I'm participating in. Am I right?

LONGLEY: If this law passes that's correct. You would be completely insulated from liability for your deceptive trade practice.

HOCHBERG: What I described to you is not deceptive.

LONGLEY: No, it is deceptive if you make a misrepresentation, even if you don't know it's deceptive. If it has the tendency or capacity to be false, misleading, or deceptive and you actually mislead somebody, even though your intent was not to mislead them, you are still liable for actual damages that would be caused by that deception.

SEIDLITS: So the theory being is that if I am an innocent purchaser, much the same as I go into XYZ car dealer and the car dealer doesn't know that the odometer has been rolled back, I don't know the odometer's been rolled back, but I decide that gosh this car just doesn't seem right, so I go down there and I have them run a check, and it goes back and sure enough there's the iron clad proof from previous title and odometer statements that it's been run back. Well then I should have the opportunity to go to the car dealer and say look, you may not have known about it but you sold it to me this way, so at least give me my money back. And that's the actual damages. And the idea is that in a free -- I think the idea was, the way I look upon it is -- that I'm out there in the market buying stuff and if I'm innocent I should at least get my money. And that's what if I send a letter I get my money back in 60 days, even though you didn't know about it. And then you have a recourse, XYZ auto dealer, to go back on whoever you bought the car from and on down the line. And in the realtor situation I think I'm buying a 2,000 square foot house and I get a 1,500 square foot house, and you didn't know about it I didn't know about it. I should have the ability to undo the deal, so to speak.

HOCHBERG: As I understand it you do under other law. It's just not as easy.

SEIDLITS: This is an easier vehicle, and I would think that you would want to be afforded that same opportunity rather than having to go down and file a suit and you saying well, I got my commission out of that one; forget it.

WOLENS: Why don't you explain why this is an easier vehicle.

SEIDLITS: Because it provides a sixty day remedy where I can just in a civil manner write you a letter and say: "Dear Tom, I got this house, I had a guy out here and he measured it and it's 500 square feet different. What are you going to do to make it right?" And you can say "well, I didn't know it was that way but in order to protect myself, my reputation, I don't want to be known as somebody that goes out and sells 1,500 square foot houses for 2,000. And it affords a mechanism to get us there without having to hire all these guys that we run up about \$300,000 since 2 o'clock. And that's the theory behind it. Larry, is that half way correct?

YORK: Not quite that correct [laughter].

LONGLEY: Well, I'll take it a step further--

SEIDLITS: Well it's the same idea in a product. I mean, we have products out here on the market that we're just selling, and I go to the K-Mart and I buy the toaster, and the toaster blows up on me and it's not my fault; sure I should be able to get it. And that's the reason we have strict liability in those situations. And they may not have known about it, but by golly they put that in the stream of commerce and I picked it up, and I should be able to do that.

TURNER: But isn't that another element tool. I think the problem is, let me try to add to it and correct me if I'm wrong. I think there comes a point where you ask a question when is a remedy a remedy. When does it in actuality exist. For example, one of the purposes I think for the Deceptive Trade was that you were dealing with a lot of consumers out here with small claims, and even though they may have been wrong, the claim doesn't have a value enough for somebody to go and take it to recover. It just doesn't exist. I mean they may be able to sue in another area, they may be able to go and raise an additional cause of action someplace else, but because the claim is not sufficient enough that it doesn't merit let's say an attorney taking it on, they may have a cause of action but it doesn't mean anything because no attorney is going to take the time to go out there and do it. And we are not living in a socialistic society where people are just going to volunteer their time to go after some claim that's out in the sky. And so one of the purposes for the Deceptive Trade was to try to enhance the value of a meritorious cause of action for that little consumer out there, be that person an individual or be it a small partnership, so that when that consumer or that partnership made a purchase based on the representation of someone else, and that representation did not pan out to be what it was represented to be, you have the Deceptive Trade that comes along and says look, we are going to either we are going to double the actual damages or we are going to treble the actual damages to make the claim worthy enough in order for that little consumer or that small partnership to go out and receive what they lost, so to speak. Does that person have a cause of action someplace else if you eliminate the Deceptive Trade Practices Act? I think the answer is yes. Would that little consumer or that partnership go out and try to seek a recovery in the absence of the Deceptive Trade? Probably not. And why not? Because who is going to take that claim and do anything with it. As a lawyer I'm not going to do anything with it. And what I've said to many clients who walk into my law firm: yes you have a claim, but it's not enough to do anything. And I'm a capitalist, and there are a whole lot of capitalists in this room, and we're not going to just take the time to go and chase any claim just because it's the right thing to do. And so Tom, I think what you're saying is true. The person has a cause of action other than the Deceptive Trade, but is it a practical cause of action if you don't have the Deceptive Trade, and I think the answer is no. And so when is a remedy a remedy? It's when it becomes practical enough for this little consumer or this farmer or this rancher or this partnership to go and pursue a representation that was made, on which that person relied, but the product did not meet those representations. And that to me is the purpose of the Deceptive Trade Practices Act. That's why it came into existence.

HOCHBERG: We are not damaging the consumer in this instance though.

TURNER: Well, you're damaging the consumer if you raise the standard. if now you are saying that before a consumer can have a claim that that consumer must prove that the person knowingly made a false representation upon which to sue. You are damaging the consumer when you are saying no longer must you recover actual damages, I can't recover my actual, I can only recover

my economic damages. And you are damaging the consumer to the degree if we don't some guidelines on it if you force that consumer to go to mediation, just go, and expend that cost on both sides. That's how you damage the consumer, you still provide them with the deceptive trade, but you no longer make it practical enough for them to pursue it. So you have the deceptive trade on the books, but for the little consumer, for the farmer, for the rancher, it does not mean anything anymore. Because if I join in with Layton Black as a farmer and we form a business and we go out and buy a piece of equipment, a tractor, but the bill says that because we are a small business so to speak we no longer have a claim, what does deceptive trade mean? It no longer has any value, because as a consumer I have been written out of the bill. Now I think there are some changes that need to be made in the Deceptive Trade; I think maybe in certain areas we have gone too far. But I don't think you swing the pendulum all the way in the other direction. And to me if you keep the bill as it presently stands you are swinging the pendulum all the way in the other direction, and I think it goes contrary to what we are trying to do. I do believe you take what Joe was saying, you listen to what the other people are saying and you try to come up with something that maintains the meaning of the deceptive trade, but make it practical, make it real, and provide a real cause of action. And the bill as it is presently written does not do that.

SEIDLITS: Can you get that by 11 o'clock?

TURNER: I think we can do it by 10 o'clock.

SEIDLITS: Representative Carter.

CARTER: I have to disagree a little bit, Sylvester. Looking at it from a consumer standpoint, if we define this, and I'm a consumer, and I'm going to have more rights as a consumer. I may not be able to hire a lawyer because most of these instances as given here, one was \$420 and so forth, you say a lawyer is not going to take that. We've set up in this legislation some mediation program where I as a consumer have a cause, have an action; there's still those other actions out there that I think you have already said that are still going to be under other areas other than deceptive Trade Practices. But under the Deceptive Trade Practices I have a cause of action, I can go into the courthouse without having to hire a lawyer, or maybe just pay the minimum for getting to the courthouse.

WOLENS: The minimum for a lawyer is a lot of money.

CARTER: Yes, I understand. But when I get there there's a provision set up here for mediation where I can take the least costly avenue and be given my damages. The damages as said in here or such things as repair, replacement, loss of earnings, loss of profits, injured credit standing, all of those things are still there under the new law. So I can't see where we are taking that much away. We're setting up a different avenue that not necessarily is going to make it best for the lawyers, but I think it's best for the consumer.

TURNER: Well, that consumer now under the new bill must prove that the representations that were made were knowingly, made were misrepresented. That's the difference, and that's a higher standard when the consumer must knowingly prove that. And then in order to get anything--

CARTER: There are instances where higher standards ought to be.

TURNER: And I don't question that. But I do believe that if you are going to restrict the damages from actual to economic then that is going to be a reduction if you are going to do that. And if then you are going to force the consumer to prove a knowing element before he even gets the economic damages, you've increased the standard. And then before the consumer can receive any exemplary damages he must prove an intentional element, which is a little bit higher. You are already tightening the noose. Now maybe that's something we want to do.

CARTER: On the other hand, when you get into the area of mediation then you are coming to an agreement between those two parties. It doesn't necessarily have to go to all through all the

hoops of legal steps in those areas. You're arriving at an agreement between those two people, that they can agree on that is equitable.

TURNER: And mediation may have some meaning when you are dealing with claims that have some significant monetary value. Mediation becomes a detriment when you are dealing with smaller claims. On an average when I go to mediation, you pay like \$750 on the side. And so what I am saying is that mediation has a point in litigation when it provides some meaning. It can be detrimental or it can work an undue hardship on individuals when the claims are quite small. I think you want to provide a deceptive trade bill that provides some sort of practical solution to these people.

CARTER: Coming back to the statement, though, that mediators can be had for nothing. There are volunteer mediators available.

TURNER: Bear in mind this is a capitalistic--

SEIDLITS: Representative Danburg has a question, and then we're going to go back on the witness list. Go ahead.

DANBURG: Actually this is, Bill, in response to that least expensive way to solve this is to make right on the deal. If there's been a misrepresentation the least expensive way to solve it is to give them a new toaster, or let them return the misrepresented toaster and get their money back. The person who testified as to what mediators cost was talking I think from their experience in hiring a mediator. I've been in some mediated cases before, and yes, the mediator might charge only \$150 an hour from the plaintiff. Sometimes there are four or five defendants, and each one of those sometimes pays \$150 an hour. There are some mediators that are making \$300 and \$400 per hour.

SEIDLITS: William Ussery -- I couldn't believe this, the baseball mediator. \$120 a month. Can you believe that.

MAN: 120 what?

SEIDLITS: \$120,000. Go ahead. I just thought we'd lighten up the moment.

DANBURG: It's an expensive proposition.

SEIDLITS: Well, if we could have baseball everything would be a lot better. I'd deal with them for a \$120,000 myself. OK, any more questions to Joe?

WOLENS: I want to close on the point that the committee substitute repeals sections 13 through 23 of Article 21.21 of the Insurance Code leaving not only businesses but political subdivisions totally at the mercy of the insurance industry and the insurance agents. There is not justification for that whatsoever. There should be protections in the insurance code against insurance fraud and unfair practices, and there should be protections for people who buy insurance policies under the consumer protection act. I just want to point that out because that was not in the original bill.

SEIDLITS: Bill's got a question.

CARTER: Same question. Are there not other remedies still there under other areas of law?

LONGLEY: Well, not necessarily. For unfair claims settlement practices I don't know of any other areas that would be covered there for unfair and deceptive.

CARTER: Would you define what an unfair claim settlement practice might be.

LONGLEY: Well there's a statute like not paying claims when liability has become reasonably clear. There's a whole litany in Article 21.21-2 there's been rules and regulations promulgated by the Department of Insurance.

CARTER: How does the term reasonably and knowingly -- how does that fit in? Reasonably seems to be a very small standard.

LONGLEY: Well, that's a term that's defined to the jury and that the jury determines, just like negligence; negligence is defined to the jury. Fraud is defined to the jury, those types of things.

CARTER: I can't argue points of law.

SEIDLITS: I forgot what's in 13-21?

LONGLEY: The private causes of action for persons injured in the business of insurance. And that could be beneficiaries, people injured by reinsurers, people injured by excess carriers, people injured by insurance agents. It's a whole litany there that's much broader than consumers. It's anybody that might buy a policy or might have an interest in a policy. And those protections have been then for years and years.

SEIDLITS: Let me just mention, and I'd ask Larry too to address this whenever he testifies. In the bad faith litigation under Article 21.21, the Moriale [?] decision--

LONGLEY: That was not under 21.21. That was under the duty of good faith and ideal, a common law cause of action.

SEIDLITS: That's where they interjected an intentional tort basically over and above to get you in the area of gross impunity damages?

LONGLEY: They really construed gross negligence as malice.

SEIDLITS: I couldn't remember if it was 21.21 under there or not.

WOLENS: You were saying that there were certain areas in response to what Bill asked you, he said what if you repeal the application of 21.21 from DTPA, what conduct out there won't be subject to a cause of action, and what remedies won't you have out there against an insurance company, and you mentioned one. Bad faith and settlement. Is that what you said?

LONGLEY: Unfair claims settlement practices, those things that are now covered under article 21.21-2.

WOLENS: Unfair claims settlement practices. Is there anything else?

LONGLEY: That's the one that comes immediately to mind, but if you repealed that 21.21 and took out the rules and regulations that is proposed in the substitute, you could not get to that statute.

WOLENS: You cannot. Mr. Josephson do you agree with what he just said or would you disagree with what he just said? or would you prefer not responding immediately and letting Larry respond?

SEIDLITS: Larry York might know.

JOSEPHSON: You've still got a cause of action under the DTPA probably. You can sue that same insurance company or that same agent or whatever under the DTPA without going through the insurance code.

WOLENS: Oh, is that right?

JOSEPHSON: Under the laundry list. The problem with 21.21 is people are coming under that that are consumers, and people over \$2,500 in assets and under 21.21 can file a large lawsuit. Giant corporations that have a bunch over \$2,500 are coming in under 21.21, and they say they don't have problems...

[end of Tape 3, Side B]

[Tape 4, Side A]

JIM ROYER: ...implication of how damaging the DTPA is, at least to my industry. First, I'm Jim Royer, I'm president of Turner-- I'm also chairman of the Tort Reform Task Force of the Greater Houston Partnership. As such, we advocate strong modifications to the Deceptive Trade Practices Act for all the reasons that I've listened to you discuss. Representative Turner points out, correctly and adequately, that in order to have a true consumer protection act, it must do three things. It must unbalance the playing field in favor of the consumer. If you're going to have somebody who has bought a TV that doesn't work and they're going to file an action against the RCA Corporation, they've got to have some advantage. They have to have an unbalanced playing field to have any chance of success. Two, the bill must impose the standard of perfection. You can't have the consumer argue that the toaster works kind of, didn't work kind of -- it worked or it didn't work. Either it works right or it didn't work. If the consumer says it didn't work right then you have to accept their pronouncement that it didn't work right; it's the standard of perfection. And third, in order to make the law work, as Representative Turner points out, it must be punitive. You must punish that big company for not moving up and taking care of the problem that Representative Danburg says is the Marvin Zindler approach to it. We're going to punish you, so you've got to get up there, and you've got to take care of that. That is good protection. That is good consumer protection law. And as a member of the Greater Houston Partnership, it endorses that type of consumer protection law. But let me describe to you the problem. The problem is we take that law, and we apply it in the engineering profession as an example. We will negotiate a contract to do a seventy-five million dollar water treatment plant to the City of Houston. The contract will be that thick. We will pay very expensive lawyers a lot of money to help negotiate that contract, which will dictate how much effort we will apply, how much resource we will apply, what technology we will apply, what exchange we will have with the City of Houston staff, who has a very competent staff. They have a hundred lawyers in the legal department. They have two hundred engineers in the Department of Public Works. And we will negotiate that contract that says, "Here's what we're going to do. Here's how long it's going to take us to do it. Here's what it's going to be," so on and so forth. We will then go through and design that plant and take two years to do that. We will work on the construction phase services and take four years to build that big huge plant. At the end of that, if something isn't perfect, and that contractor files a lawsuit against the city, the correct legal advice for the city attorney to give the city is, "Don't worry. Whatever you end up having to pay that contractor you will collect from your engineer under the Deceptive Trade Practices Act. It is the unbalanced playing field. It is the standard of perfection, and don't worry, you'll collect three times it." Because that engineer did that design knowingly. They knew they were designing that. They were not asleep when they designed that plant. That's what the word "knowingly" means. The word "knowingly" means you were awake when you did it, under the Deceptive Trade Practices Act. I know we had the idea that you didn't know you were defrauding somebody. Of course, that's the intent of it. But the way it currently reads it just means you were awake when you did it. Now, that Deceptive Trade Practices Bill doesn't belong in that issue. That causes the contractor to file the claim. That causes the city attorney to say, "Separate! Forget right and wrong. We aren't going to worry about right and wrong. Separate that contract. We aren't even going to bring that contract up. It no longer applies. Whatever you negotiated in that contract is not germane to this dispute." We're going to do it as though it was a consumer, as though you bought a toaster, not a seventy-five million dollar water treatment plant. They would sue me under breach of contract. They can sue me under breach of warranty. They can sue me for negligence. They can sue me for malpractice. They have all these other remedies that they can come after me. And they list them because that was honorable, then right at the end they say, "And we're going to sue you under the Deceptive Trade Practices Act." Then my attorney tells me, "You have no defenses. You have

no common law defenses to this. They're suing you for punitive damages, and your insurance carrier tells you you aren't insured." In other words, they're suing you for your business. If you are a foolish enough business manager to go into the courthouse on that and lose that, you have put your four hundred and fifty employees out of work. The law doesn't work when it gets to complicated business transactions of that type. That's what the Consulting Engineers Council wants relief from. That's what the Greater Houston Partnership is seeking relief from. The law corrupts the system. We have made it easier in Texas to redistribute wealth than we have to create wealth. And the business that goes on in Texas nowadays is let's just redistribute it. Those who work in the business of creating it are getting crushed out, and the trial lawyers are into their seed corn. We need some relief. We need your help to call it off, to put it back on a level playing field when we get into our areas. That's what we're looking for. I know we can go over all sorts of minutiae. But as I heard all of your examples, of how does this fit into the law, you always brought it back to some consumer law, some consumer transaction. We need a DTPA consumer protection act for those transactions. For the guys who bought the tractor. I hope they'd first go to John Deere and ask if they would honor the warranty (probably will). But if they don't, they probably need a DTPA. If it's green carpet and you want it blue, you probably need a DTPA. If it's a waste water treatment plant, seventy-five million dollars, we don't need the DTPA to decide who did what to whom and who owes who what duty. We have contracts, we have all sorts of standards to measure that performance by. That's what we need the relief from. That DTPA just corrupts the system so badly, you don't separate right and wrong. You're not even pursuing right and wrong. But, that's the hope the engineers have, the Greater Houston Partnership, and we would appreciate any assistance, and we certainly do understand how complicated, how important it is, that you draw that line, bracket the transactions that are covered by it carefully. Bracket, more importantly exclude those transactions that don't belong in there, and get us into just regular common law and let us be persecuted and judged by those standards. Thank you very much.

SEIDLITS: Wait a second. Jim, we've had this discussion many times, and I agree with much of what you say. You want to just make that distinction of the smaller consumer or small business, somewhere where we can bracket it down. But when you have big guys paying a lot of money for lawyers who are negotiating contracts on the market, and the other side has competent legal advice, and everybody's up here in the big league, then leave them up there, not on this unlevel playing field that we give to the consumer down here.

ROYER: What we want it to say is a deal is a deal, and you live by your word. That's how you should conduct--

SEIDLITS: And you sue on the contract.

ROYER: And you sue on the contract.

SEIDLITS: What's that break point? What do you think?

ROYER: We've looked at a lot of ways to try and help the lawyers try to figure out how to bracket this. There are people working constructively on this and going over the same areas of how do we define this? One of them is that they impose if you have more than twenty-five million dollars in assets back in 1979 they said you can't use this. Although, they buy typewriters that break, just like somebody else buys a typewriter. But they say OK, if you have more than twenty-five million, you don't get to use it. I've heard the suggestion that if you're trying to recover more than five hundred thousand dollars, that is not a consumer transaction. That's not carpet. You're into something complicated, and you should have been paying attention to what you were doing. You should have had a contract for what you're doing, you should have gotten a warranty for what you're doing. So there's some dollar amount. If it's not five hundred thousand, make it a million. If it's not a million, make it two million. Make it some number, that if you're seeking that much in damages, you can't use the DTPA. If the cost of the services you were buying, if you were spending twenty-five thousand dollars on services, then you should have a contract with that person, and you should measure that person by how they perform under that contract. So maybe that's outside the realms of the DTPA.

WOLENS: Why wasn't your contract with a governmental entity? Why didn't you contractually waive the application of the DTPA?

ROYER: That means you got to the city attorney, a fine fellow, and he'd say, "We want you to sign this thing that says you're waiving the law of the land." The wisdom of the Senate-- OK, and he can't do it. It's a matter of public policy. He can't say, "The legislature gave me that law, but don't worry, City Council, just find another way." He's not going to do it.

WOLENS: I have a bill dealing with contractual venues that I'm carrying on behalf of the Texas Business Law Foundation, and it has in there five hundred thousand dollars as the line, which I thought was reasonable until we got into Committee last week and someone suggested that for repairs, construction, repairs on the home, they can often go over a half million dollars. I thought that was pretty reasonable. So, we started looking at over a half million dollars. But I think there ought to be a number that you start to feel like the transaction is a sophisticated transaction.

ROYER: We had engineers that looked at that and said, "Well, maybe say it's five hundred thousand dollars, comma, except for residential construction, comma." I know there's a little bit of heartburn about letting lawyers have the DTPA. No offense to my good lawyer friends, but we can say "professional, comma, except lawyers, comma," and get on down the road. They want to sue each other anyway, because that's where all the money is now. They've gotten all the money out of the engineering field that they're going to get. They have to get after themselves here pretty soon. But that's just one reason why they aren't after the little people.

SEIDLITS: You're doing real good. Representative Hochberg has a question.

HOCHBERG: Let me just make sure I'm clear, Jim, on what you do. Under that sort of approach, I can't envision a transaction, but let's say I could envision a transaction where I hired you to do something for me on a personal basis, some kind of engineering around my house.

ROYER: A driveway. You want to build a driveway.

HOCHBERG: I want to build a driveway. But, I hire you to design my driveway, or make sure that you don't run through West University Place's sewer interceptor that runs under my sidewalk. You wouldn't have a problem being under DTPA under that kind of transaction, even though you're a professional, even though you're an engineer.

ROYER: For that kind of transaction it would be appropriate. For a uninformed residential owner for his home use needs a driveway, and doesn't know what kind of permits you need, doesn't know what you do about the drainage and stuff and hires an engineering firm to say what he's got to do here. I think that's a consumer transaction.

HOCHBERG: Even though you're one of the organizations, you pay the licensing fee, and you pay the extra revenue fee, and the whole bit. That's still OK with you?

ROYER: And I'm trying to find a way to bracket it. Yes. There seems to me that there's a size of transaction you get into where "the consumer" stops becoming the victim consumer and starts becoming the sophisticated purchaser of goods and services, or should be a sophisticated purchaser of goods and services. There seems to me that there would be some line in there.

HOCHBERG: Thank you.

TURNER: How do you exempt out governmental entities?

ROYER: I think there are governmental entities that when they get below ten thousand in population that they probably deserve the right to use the DTPA. There's some population number there.

TURNER: Right.

ROYER: Where, though, when you get over a certain number, hell, they hire Vinson & Elkins to represent them. They've got great lawyers. They've got a Department of Public Works. They use federal standards. A lot of this work we do comes from federal standards, and they say, "You'll do it this way", and it is approved by Tenrack [?], and you'll get paid that much for doing it. This is the form of contract you'll have." That happens in communities of twenty-five thousand.

TURNER: That's what I'm saying. The example that you're sighting is a very persuasive one. But, I'm just wondering-- just trying to craft the bill to deal with those types of examples, which I agree with you, merit a response, a legislative response, as opposed to crafting something so broad, with such a broad net, that it just grabs everything within the net.

ROYER: I think you're right, Representative Turner. I know that the lawyers and Joe Longley, and Clark Morton and all the others and Mr. York are trying to thrash that out. But that is why we look to you legislatures to make sure they do that with some degree of reasonableness. There is definitely a line.

DANBURG: Jim, everything that you're saying I think is really on target. I mean, the examples you're giving. I think we all agree with. You are aware that the bill does a lot of things other than what you're addressing.

ROYER: Yes I am.

DANBURG: OK. You're also aware that it has been presented to the public that we either agree with everything that we were presented in the eleven points or we're anti-business.

ROYER: I would hope that the news media could do a better job of explaining that. I think it's that there are eleven areas that need addressing. What exactly is done to the DTPA is up to good thoughtful people figuring out how to make sure it stays a strong consumer protection bill, because you need that in a state to attract the businesses we want here, to have the right business atmosphere that we want. But at the same time it just doesn't run amuck. It doesn't become the plaintiff's lawyer's lunch box.

DANBURG: I've voted for dozens of Tort Reform bills in my billion years on this committee, and I hope that this one gets to the point where it is fair and I can vote for it. But this attitude that you're either for everything that we bring to you or you're anti-business is really getting on my nerves.

ROYER: I think there a lot of us, Representative Danburg, who understand the sausage-making process is a process that all bills need to go through. We're here to lend our advice and support, but it is the lawyers who start putting in the commas and the semicolons and we engineers just hope that it comes out to be some reasonable standard we're hoping for. Thank you very much.

SEIDLITS: Thanks, Jim, Mr. Royer, If I could just echo what she said, I found your testimony to be reasonable and persuasive.

RAMSAY: May I ask at this time, Mr. Randall Birdwell--

SEIDLITS: Hold on, one second Richard. I'm going to have to call someone out of order and we're going to come right back. Mark Alan Owens. Mark is representing the handicapped community. Let me call him up. Mark is testifying against HB668.

MARK ALAN OWENS: First of all, I'd like to thank you all very much for giving me this opportunity to speak on behalf of myself and other handicapped individuals. In particular, I feel like the handicapped community is particularly susceptible to deceptive trade practices for many reasons through either hearing impairment, other impairments, a feeling in the business community that we can be taken advantage of. My particular story I'd like to share with you. I contracted

for a trip to Mexico, and I specifically outlined the accommodations I would need on my trip, specifically bathroom accommodations. These were promised to me repeatedly. I wanted to make sure I would have these, and I reiterated them. I gave them the specifications of my wheelchair, what I would need in a handicapped bathroom, everything that I would need. I told them I would not go on this vacation were these not guaranteed to me. When I got there, needless to say, they didn't know who I was. I had to go to the embarrassment of in order to use the bathroom facilities, transferring on to a hard model floor, sliding on the ground, not feeling below my waist, I was lacerating my tissue. I ended up getting an injury, wounds, where it exposed my tailbone. I have pictures if you'd like to see them. I underwent three surgeries. I lost my potential for job advancement. I lost my wife, my marriage, because she became my nurse and I became instead of a handicapped person who was self-sustainable, a dependent. The people now want to claim, "Oh, let's pass the buck" you know. I talked to the person, at one time it would be-- I had just got off the phone, "There won't be any problems with the accommodations. Yes, there's a handicapped facility. If you pay for an upgrade, we can fit you up there." Repeatedly lied to. Over and over and over again, merely to get the sale. As you expressed earlier, Representative Turner, am I going to be able to go after these people easier now, or am I going to have less of a recovery? I have no-- my understanding of this bill as it's proposed, I don't have any mental anguish compensation avenues under the DTPA, if this bill stands. If my understanding is correct.

SEIDLITS: It's correct.

OWENS: It is correct? I'd like to submit these photographs to you. The top one there is after one of the surgeries that tried to heal the lacerations as a result of scraping on the floor to try to use the bathroom was unsuccessful and they tried a closure. The second time they tried forty hyperbaric treatments. I don't know if you're familiar with what hyperbaric is, but you only go in a hyperbaric chamber if you have the bends, or you have a non-healing wound. It's like going inside a little bank vault teller dispenser that leaves you almost no room to move your arms. It's very claustrophobic and it creates a lot of pressure on the ears. There was four of those, and they're about a thousand dollars apiece. I have since racked up approximately two hundred thousand dollars in medical bills. Lost my marriage. I'm set back on my rehabilitation. I just think it would be a crime if this bill were to be passed, especially to those in the handicapped community. I would strongly urge the committee not to weaken the strength of the Deceptive Trade Practices Act.

SEIDLITS: Thank you, Mark. OK, any questions for Mark? On behalf of the committee, let me thank you for sticking around with us and being patient with the committee. We know it's gotten real late. We appreciate your testimony, and we will take it under due consideration.

OWENS: Thank you very much.

RAMSAY: At this time we're going to call on Wade Spillman. Is Wade still here? OK. Wade is representing the Texas Association of Insurance Agents testifying for the bill.

WADE SPILLMAN: Mr. Chairman and members of the committee, my name is Wade Spillman. I'm an attorney here in Austin. I'm with the firm of McGinnis, Lockridge & Kilgore. I represent the Texas Association of Insurance Agents. I'm especially happy for the opportunity to talk to you a little bit about the interaction between the DTPA and 21.21 of the Insurance Code. As of course you know, both the DTPA was enacted in 1973 as has been stated here. Appended many times over the years and at the same time, in 1973 Article 21.21 which had been adopted in 1951, was amended to provide a private cause of action separately in 21.21, which made relief available to injured parties and private causes of action, if you please. At the same time the DTPA includes section 1750 was enacted. That section was entitled relief for consumers. So you had corresponding private causes of action: one in the DTPA, one in Article 21.21. Incidentally, the insurance industry is subject both to Article 21.21 as the private cause of action created in 1973 for folks in the business of insurance, and of course, they're also subject to the provisions effective 1750 of the DTPA. Now interestingly enough, over the years those sections have not stayed the same. That is, identically with each other. For example, the thing that prompts us to be here

today is not to ask for to be exempted from the act in any respect. We don't intend nor recommend that you repeal Article 21.21 of the Insurance Code. What we're interested in is being treated the same way with reference to the measure of damage that the people that are only subject to the DTPA. Now isn't that interesting? We want to be made subject to those provisions. Others want to be exempted from them, and I understand their arguments. I share their judgment about their desire to be exempted. But the thing that concerns us particularly is that under Article 21.21 of the Insurance Code, and especially Section 16 thereof, which it provides for the available injured party. We are subject to automatic trebling -- automatic trebling. Not up to trebling as in the DTPA based on the decision of the ??? fact, but rather if we are found to be involved in a knowing violation, which incidentally, as one of the speakers has indicated, the courts have said if you're not asleep in the middle of the night and you did an act, you did it knowingly. Of course, if you're subject to 21.21 Section 14, as anybody in the business of insurance is, then it's automatic trebling. I think one of the most interesting things I've read in a long time, and I've practiced law for forty-five years, is a decision that came out of the El Paso court in which the judge who wrote the majority opinion also wrote a dissent, if you please. In the dissent he in effect said all the jury had to find was that the defendant in that case knowingly committed the act, a finding which would be pretty much automatic, unless the jury could reasonably conclude that Hart did not know what he was saying -- the defendant.

WOLENS: What was the conduct, Wade?

SPILLMAN: I'm sorry?

WOLENS: What was the conduct?

SPILLMAN: The conduct of that case was an insurance case where the argument was how much the coverage was to be. There was a policy of insurance written--

WOLENS: And how much was the policy for?

SPILLMAN: Several hundred thousand dollars on the home. Actually, it was on a business that burned down. The question was whether or not the plaintiff or the defendant was telling the truth about the effort to get additional coverage. They wrote a policy. The question was, did they say they were going to get additional coverage or did they say they were going to try to get additional coverage.

WOLENS: The agent?

SPILLMAN: Yes. It was an agent in that case. Now--

WOLENS: There was a dispute of whether the agent was going to get more coverage for the home owner or not?

SPILLMAN: That's correct. Well, for the business owner.

WOLENS: For the business owner. The land owner.

SPILLMAN: Right.

WOLENS: And the business owner says that the agent was going to get him more coverage and the agent said--

SPILLMAN: the agent was going to try to get it.

WOLENS: He was going to try to get it. OK

SPILLMAN: Now, interestingly enough the-- well, they found for the plaintiff, that the plaintiff knowingly engaged in the act, sold this coverage--

WOLENS: That the defendant did or the plaintiff did?

SPILLMAN: The defendant did. Right. The question was, once they find that he did this act, then it's automatic trebling. Automatic trebling. In fact, interestingly enough, the judge in his descent, the same one that wrote the majority opinion, said, it's interesting, Representative ???, what this judge said. He said that the attorney of course did not-- in fact he denied that he was asking for any punitive damages. He said that he's asking for the actual damages only. Well, obviously, the law requires the judge to treble it. 21.21. We say that's not fair, and I think most people agree it's not. The question ought to be whether the trier of the fact decides it's up to trebling, as in the Deceptive Trade Practice Act. All we're saying, and incidentally, all we're doing in this act, we're not trying to repeal Article 21.21. We're trying to say, look, we're repealing the private cause of action section and several other sections, which I'll quickly tell you what they are, in Article 21.21. We want to be over or under the Deceptive Trade Practice private cause of action provisions exclusively. We're not trying to escape it. We're saying that those-- that that's where we want to be. Here's what is required for that to happen. You repeal Section 16 of Article 21.21. We're already under Section 1750 of the Deceptive Trade Practices Act anyway. That's where we want to be, because you have a fair measure of damages there. We're not trying to get out from under anything. We're saying, "Look, the measure of damage, and the damages ought to be determined by the same rules for us as anybody else, up to trebling."

WOLENS: Is your only concern, is your only justification for messing around with 21.21 under here, is because of the automatic treble damages?

SPILLMAN: That's the primary thing that motivated us. There are other things here that are involved. Now, the things that we-- let's talk about the sections that we repeal or ask to be repealed. It's in there. That is in the committee substitute. Section 5 and Section-- the only ones that pertain to us are Section 5 and Section 12. Section 5 of this committee substitute on page 7 and Section 12 on page 18. Section 12 is the one that repeals certain sections of the Insurance Code. What are they? What are we requesting be repealed? All right. Section 14 and 15 of 21.21 deal with the administrative class actions and injunctions. If we repeal them, similar enforcement authority is available around Section 1747 of The Business and Commerce Code. So that's available under The Business and Commerce Code. Against us. People in the business of insurance. We repeal Section 16. That is the private cause of action provisions in 21.21. We're saying we'll be under Section 1750 of the DTPA, period. Section 17, 18, 19, and 20 of Article 21.21 authorize class actions and direct the procedures, notice requirements, and defenses. Identical provisions were in the original DTPA enacted in 1973, but they were repealed by the legislature in 1977. The rationale then and now is that all class actions be governed by the Texas Rules of procedure. Class actions will still be available. All right. Section 21 that we're repealing, or requesting to be repealed, in the venue provision. That's over under the DTPA. Section 22 has to do with voluntary compliance; it really something that's a value to the insurance industry, but we've concluded it's unnecessary. So every section that we're asking to be repealed in 21.21 has nothing to do with a private cause of action against people in the business of insurance. Now, the section in this bill, Section 5 on page 7, let's talk about what that does. You asked me what else do we do?

WOLENS: Before you go there, I would ask you please if you have pages that explain the policy behind Section 12. I would just like to see it at your convenience.

SPILLMAN: Section 12?

WOLENS: Yes. Section 12 of the bill. Page 18, line 15. Those are the portions that you just went over, and I don't need to have them now.

SPILLMAN: The repeals.

WOLENS: Yes. But, the policy behind repealing each one of the sections. Do you have it written down at some point?

SPILLMAN: I do.

WOLENS: In a week or so I'd like to have them.

SPILLMAN: No, I'll get it for you. Tonight. But, all I'm saying is that every one of those things are available under the DTPA. We're subject to them. We'll remain subject to them under our approach.

WOLENS: If you just have something written down. Where it is in the insurance, where it is in the DTPA, so I could see it with my eyeballs and give me the policy behind it is fine. I am persuaded then.

SPILLMAN: Fine. Now, let's go to Section 5. What we do there is that we do make a change and recommend a change, and that is so that we'll be subject to an act or practice in violation of Section 4 of Article 21.21. Section 4 is the laundry list in Article 21.21 of those things that are unfair trade practices. We also are now subject to all the laundry lists in the DTPA. Do you understand that? So we're not removing any of those things. The thing we are asking to be removed is for there to be a private cause of action based on rules or regulations adopted by the now Commission of Insurance, formerly the State Board of Insurance. The policy issue there is, should we subject to a private cause of action based on a rule passed by administrative agents? Or should we be subject to a private cause of action for specific egregious conduct in the mind of the legislatures, that they put in a list of things to which we shall be made subject to private causes of actions for? That's the policy question. Now, if there are other things for which the business of insurance ought to be subject to a private cause of action for, specify them with particularity it seems to us. Don't leave it to the administrative agency to do, the whim of the given commission of the State Board of Insurance former. That's our policy issue there. Now, the only other thing that has to be done here, and we've tendered language to those people that are working on this bill trying to negotiate some of these things.

WOLENS: The reason that it may be helpful is that perhaps some of us may even walk on the outer limits of this and participate ourselves. As soon as we stumble into it, perhaps we could know about that.

SPILLMAN: I understand. That's what I'm going to tell you. The other thing is not in this, that was not picked up and put into this particular bill before you in a formal proposed committee substitute. Let's talk about the definition of consumer.

WOLENS: Before we get there, could I go back to the section that you were referring to in Section 5?

SPILLMAN: Oh, yes. Sure.

WOLENS: I am not receptive on a lot of suits for pain and suffering under DTPA, but I have read a lot of cases where insurance companies are unfairly paying claims-- paying for insurance claims that are made, people don't get the kind of medical attention that they believe they're entitled to under a policy. They believe they have got a Deceptive Trade Practice claim against the insurance company. It would just seem like if the insurance company supposed to be paying for medical treatment and they refuse to pay for medical treatment, and if the jury finds that they refused it improperly, doesn't even have to be under a health insurance policy, it could be under PIP for example. Why shouldn't there be more for them to sue under than just economic? Why couldn't they also sue for actual, and I'm not even discussing punitive, why couldn't they sue for actual damages?

SPILLMAN: Well, the question is, what kind of a private cause of action should you provide for people in that particular situation.

WOLENS: Well, what do you think is reasonable? I mean, it just seems to me, that if a person goes out and buys insurance and the purpose of the insurance is to pay specifically for medical attention, that's what PIP is for, and if it's supposed to pay for medical attention and then they refuse to give you the money for the medical attention, and there are a lot of people who just don't have money, and the doctors-- every darn doctor I go to these days insists on getting cash on the way out. If they go to a doctor, and the doctor wants money, and they don't have money because the insurance company wouldn't pay them the PIP, and they get sicker, they don't get medical attention, why shouldn't they be able to sue the insurance company for more than economic damages?

SPILLMAN: Well, they can. They sue them for treble damages. They get their court costs, they get their attorney's fees.

WOLENS: But on this section that you were referring to, Section 5, page 7, line 5, you're getting rid of the words "actual damages" and you're substituting the words "economic damages." Page 7, line 5.

SPILLMAN: Well, this is the approach that the drafters of this thing took. This is not my language. Although, I don't disagree with limiting the damages here to economic damages, plus the opportunity to treble. The question is what kind of-- what should we offer the people by way of a statutory cause of action? Everybody's more obsessed with all of the other things you have available. But I'm for leaving this available to the consumers. In fact, I'm going to talk to you in a minute about even broadening the definition of consumer in so far as causes of actions against people in the business of insurance. We want to be fair and realistic and reasonable in this thing. But, in so far as limiting it to economic damages, I'll leave that to the other people who are really trying to expound on these questions. The short answer, it seems to me, is I don't think that's unrealistic or unfair. It's less than they have now available to them, obviously. But it's not unreasonable to say the consumers will have a cause of action for their economic damages as defined in here, which is the same definition of punitive bill by the way.

WOLENS: But we're talking about two different things. The punitive deals with punishment.

SPILLMAN: I'm saying, that's available to you under this act.

WOLENS: I want to put the punishment somewhere else. I'm just looking at this one thing: relief for the consumer. I don't want to hit them with punitives yet; I just want to do it one step at a time. "The consumer may maintain an action where any of the following constitute or produce and causes economic damages." Then we discuss the insurance code. What I'm asking about, not going to punitives yet. Leave the punitives aside. For purposes of just recovering, why shouldn't they recover actual damages as opposed to just economic damages, in the example that I gave you with respect to insurance companies.

SPILLMAN: I don't think you can answer that without looking at what else is available to them. I think it's not so important what you start with as what you finish up with, it seems to me. That's the best answer I can give.

RAMSAY: Maybe you or Steve could explain to me what's the difference between actual and economic.

WOLENS: In an actual-- you're welcome to.

SPILLMAN: Go right ahead.

WOLENS: In an actual damage-- in a economic damage, if the insurance company does not let you go to the doctor, for example, and you needed medical attention and somehow you get medical attention, part of your economic damages are the cost of your medical treatment that you would or would not have received, because you get a bill. An economic damage is something that you can get a bill for. Pain and suffering is not something that you can get a bill for.

RAMSAY: Is that actual? Is pain and suffering actual?

WOLENS: That is part of your actual. Part of your actual. If you are hurt in an accident, and your right arm is cut off, you're going to look funny. Therefore, it's called disfigurement. Disfigurement is part of your damages, because you used to have an arm, and now you don't have a arm. Or, maybe you've got a cut right across your face, and if you're a model with a cut across your face, it's not very good. That is a disfigurement. But a disfigurement doesn't come with a price tag. So that is not a economic damage.

WOLENS: Didn't someone at the beginning of this say that actual and economic were the same?

SPILLMAN: No. No, I don't think so. I think that's the correct answer. If I may, Mr. Chairman, and members of the committee, say that with reference, the other thing that would be necessary to accomplish what we're trying to do, and I hope I've explained it to your satisfaction, what we're trying to do. We're trying to get out from under the private cause of action in 21.21 because it provides a different measure of damage than is under Deceptive Trade Practices. We're under both of them now. Everybody sues us under both of them, along with all these common law causes of action. When we've engaged in some kind of act that is perceived to be unfair in contest and sues. We're saying we want to be under, that's the irony of all of this, everybody else wants out, we want under the provisions of the Deceptive Trade Practice Act is so far as the private cause of action is concerned. Now, in order to accomplish this in a fair way, it seems to us, and we certainly want you to understand, we're trying to be fair in that regard. We'll explaining to you exactly what we're trying to get out from under. We're trying to get out from under the rules and regulations as a basis for private causes of action. The rules and regulations adopted by the Department of Insurance. We think that we ought to be subject to private causes of actions for those things the legislation specifically determines ought to be the subject of a private cause of action. All right. We think that the one thing that needs to be done, and we delivered language along several lines to some of the folks that are working on this thing, Representative Williams. We've been invited to, and so we do so. To the definition of consumer, the question is, should anybody besides an individual be entitled to sue those of us in the business of insurance as well as anybody else under the Deceptive Trade Practices Act. We say, "Look, we're willing to concede this for the purpose of the definition of a consumer under the Deceptive Trade Practices Act, it ought to mean something besides an individual." Maybe it also ought to mean a partnership and a corporation. Even possibly some sub-divisions or agencies of this state. The point I'm making is that we're not so much concerned or even trying to limit it to just individuals necessarily. We're saying the proper way that as to us, those of us in the business of insurance, maybe the better way is to do it is by capping the amount in controversy, as was discussed here with a prior witness. So, all I'm saying to you, finally and then I'll sit down, is again, anybody in the business of insurance, including the agents I represent, for any perceived unfair trade practice, we're sued presently under DTPA, under 21.21, all common law actions anybody can think of. That's the way I sue people, obviously as a lawyer. I'm under a duty to do that if those causes of action are available to my clients. We're saying that as for this private cause of action that was really created back in 1973 -- it was just put in two places for people in the business of insurance -- we're saying take us out from under the private causes of action in 21.21, let's show that the exclusive private cause of action, statutory cause of action for an unfair trade practice by anybody involved in the business of insurance, will be brought under the Deceptive Trade Practices Act. The reason we want to do that is twofold. Number one, it makes available to us the measure of damages up to trebling. Now it's automatic trebling under 21.21, if it's a knowing act. But the courts have pretty well said that if you didn't do it and you're asleep you know you did it, so it's automatically trebled under 21.21. The other thing that we want is, frankly, the offers of settlement that are in this deal which we think are appropriate, and any other conceivable defense that you in your judgment perceive as appropriate to give to people who are sued under the Deceptive Trade Practice Act in this state.

WOLENS: Wait. What is the case that-- I assume it doesn't say you just have to be awake, but what case do you generally look at to say that to be knowingly with some weak standard?

SPILLMAN: I don't have the list of cases, but I can get them for you.

WOLENS: If you would, would you give me a list of the policy reasons behind the sections that you're going to repeal, if you could also get me a copy of the cases, I'd appreciate it.

SPILLMAN: Absolutely. It's generally accepted that--

WOLENS: I don't dispute it. I just want to read it.

SPILLMAN: So finally, let me say that if there are other causes of action or other unfair trade practices that you perceive ought to be the subject of your private cause of action, I tell you they ought to be spelled out with particularity in the statute and not left up to some regulatory agency to decide.

WOLENS: I think that's the easy one.

TURNER: Thank you, Mr. Spillman, for your testimony.

SPILLMAN: Thank you very much.

TURNER: Are there any questions for Mr. Spillman? I want to thank you. Let me also just remind everyone that we have about thirty people left testifying for it and seventeen testifying against it. Just bear that in mind as you go through your testimony. If you can kind of keep from rehashing things we've already discussed that will be helpful. If you'll just kind of bear in mind. David Bragg. Speaking against HB668.

DAVID BRAGG: Mr. Chairman, my name is David Bragg. I'm former chief of the Attorney General Consumer Protection division. I've co-authored two books on the Deceptive Trade Practices Act. I served as chairman of the consumer law section for awhile and I'm part of that committee that's meeting now to discuss the statute. I'd like to respond to a few quick points if I could. First, with respect to other available causes of action, there are no other available causes of action for some very practical reasons, as Representative Turner touched on earlier. Under breach of contract, I can write a contract that waives my right to sue. That would be found in nearly every contract that's written in the state of Texas if this is passed. With respect to fraud, you cannot recover attorney's fees, and with respect to negligence, you cannot recover attorney's fees. What that means is there must be thirty thousand dollars or so at issue before I as an attorney could afford to take the case on a contingent fee. Or my client would have to be able to afford to hire me on a hourly basis to take the case. So as a practical matter, if you take out the attorney's fees element, or if you allow a waiver like under a contract, there is no other cause of action available as you would have under the Deceptive Trade Practices Act. Mr. Chairman, one other thing I'd like to make clear. When you affect this statute, you affect a whole host of other Texas laws. I'd like to hand this out to the committee if I could. It's a compilation of statutes that refer to the Deceptive Trade Practices Act as the basis for a cause of action. As you affect this statute, you also affect all these other some approximately thirty statutes. And I'm not sure mechanically how you want me to handle this, but this is a listing of all the statutes in the state that currently tie into the Deceptive Trade Practices Act. It says this conduct is illegal, but if you want to do anything about it, go to the Deceptive Trade Practices Act. As you change this statute, you also are changing the remedy for things like the Declaration Practices Act, Health ??? Act, all these special statutes that were enacted because of particular abuses that were occurring across the state. With respect to "knowingly" being a lesser standard, in 1989 I conducted a study of the Deceptive Trade Practices Act. We looked at thirty-four Texas counties and studied every jury trial that had been tried over a three year period of time in those thirty-four counties. That included all of the major metropolitan areas of Texas, but for El Paso. In that time we found that with respect to "knowing" violations, only thirteen percent of the cases had a jury findings that a violation, that something was knowingly done. So that means that you'll be cutting consumer litigation down to thirteen percent of the cases that currently are filed. Only those people will get a recovery. With respect to "knowingly" being an easy burden, The Supreme Court in Luna vs. North Star Dodge Sales found of course that it's a heavier burden than gross negligence under

which currently you can recover punitive damages. Then, there's also been mention of the DTPA being used as a substitute for other suites like product liability. Of the 695 jury trials that we studied in this thirty-four county area, 16 of those cases involved personal injuries. Sixteen out of 695. Four involved product liability cases. This is over a three-year period of time. I don't think there is any demonstrated evidence to show a pattern of abuse of the statute in these other areas; there are occasions when it occurs, but it's very rare when in fact it does occur.

RAMSAY: When did you do that study, David?

BRAGG: In 1989. This was at a better time for the statute. It was stronger then than it is now. Mr. Chairman, that's all I wanted to say. Out of respect for y'all's time, if you don't have any questions, I'll sit down and be quiet.

CARTER: Your statement that fraud and negligence does not allow for attorney fees unless the cause of action is thirty thousand dollars, did I hear that right?

BRAGG: Well, the example I was trying to use is this: most of my clients cannot afford to pay my two hundred dollar-an-hour fee, so I have to take it on a contingent fee if I'm going to represent them. I cannot possibly try a case for less than about ten thousand dollars in time. That's a real cheap case. So there has to be like thirty thousand dollars minimum involved before there's enough out of which I could get a contingent fee. The practical result is no law suit, unless you can also recover attorney's fees. Those causes of action don't let you do it.

CARTER: But that's strictly an economic decision based on the attorney.

BRAGG: Absolutely.

CARTER: OK.

WOLENS: Bill, I would like to tell you why I unfortunately have personal knowledge of what you just said. This man and his law firm sued my wife personally two years ago at this time. His law firm and his law partner were taking my wife's deposition in their office in Dallas. I can tell you that what he says is accurate as far as what goes on in his head before they file a lawsuit.

RAMSAY: Mr. Bragg, would you recommend to a client they sign a contract that signed away his right to sue?

BRAGG: No, but if you allow-- if you say that people can go to breach of contract as an alternative cause of action. I represent for example, one of the largest boat manufacturers in the world. Their contract, if people buy their boat, will contain a provision which says you cannot recover for consequential damages, you cannot recover for this, you cannot recover for that. As a contractual matter, I can waive those rights. The Deceptive Trade Practices Act doesn't let you do that. But contract law does let you do that.

RAMSAY: Well, but my point is, if you did not want to waive those, you would not have to waive them.

BRAGG: You're assuming that the person is represented by an attorney. I'm not talking about the waiver provision that's in here by waiving the statute. I was responding instead to your question about whether there are alternative causes of action. My point is there are not, if you start analyzing those other causes of action like breach of contract. Breach of contract has it's own set of rules. One of those rules says you can waive anything, virtually, in a contract setting.

SEIDLITS: Do you find that you have to basically sign those if you want to get whatever you're getting?

BRAGG: Oh, sure. If you're going to buy a car, whatever, you're going to have to sign a document. Close on a house, or whatever.

SEIDLITS: Thank you.

BRAGG: Thank you.

RAMSAY: L. Minton Rosenhouse. Texas Society of Certified Public Accountants. Minton, go ahead.

ROSENHOUSE: Ladies and gentlemen, my name is Minton Rosenhouse. I'm a CPA in Dallas, Texas. I'm a shareholder and officer of H. Pearson and Company. In addition, I serve on the AITPA Small Firm Advocacy Committee. I'm a member of the board of directors for the Texas Society of CPAs and local Dallas chapter board. I'm speaking in support of this bill because the current abuses of DTPA and how it affects myself, my firm, and my livelihood. It takes away any defenses I have when I try to sue a client. Whenever we have a fee dispute with a client, the first thing that comes from the defendant's attorney is, "We're going to sue you for malpractice," and then they assert a DTPA claim. Our malpractice insurance says you never should sue for fees because you know you're going to get sued. When you get sued, you're not covered for exemplary damages. I feel that's taking away my right to collect for fees, when I've done good work and I've done work for the client, and they decide, because they know that a CPA won't sue, all they have to do is threaten a malpractice suit and we'll go away. In our firm it doesn't happen. We assert our rights and let the chips fall where they may. The only problem we have is that you've asked why should professionals be exempted. The reason is, as a professional, I can't say, "My corporation did this work, and therefore my corporate assets are at risk." When we sue, we do anything as a professional, our personal assets, everything I have that I've built for my family, is at risk, because all of my personal assets go behind my personal service income. Specifically, several years ago we got involved in a fee dispute with a plastic surgeon in Dallas, Texas. He was involved in a bill fishing tournament business. Quote, a "business." He insisted that we treat this as a business and we write this business off. The IRS saw through what could be a problem and audited this man. We had the proper business books. He did everything that you're supposed to do, properly for business. But IRS disallowed the whole claim. Our fees ran up in the course of representing the client approximately thirty-six thousand dollars. My partner several years before that had given him some advice on a investment that-- he sent a memo that should/could be deducted as capital gains. It turned out, the IRS didn't know this was an ordinary gain deduction. Or an ordinary gains income. Well, the bulk of the audit revolved around this bill fishing and the thirty-six thousand dollar bill. The minor part, which was this capital gain versus ordinary income deduction, was about five hundred dollars of the bill. Well, the attorney filed a counter-suit on us, they asserted DTPA. CNA spent approximately one hundred and ten thousand dollars defending us. Their attorney spent ninety thousand dollars defending him on the bill and filing of malpractice. The outcome of it was the insurance company said, "If you want to continue having coverage, you need to walk away from this claim." We walked away from a thirty-six thousand dollar claim for bills. Our insurance company paid the doctor approximately thirty-thousand dollars in damages, and we walked away. The problem is, we only walked away because DTPA said all of our assets were at risk and the insurance company told us, "You don't have any coverage." On top of that, they made us hire a separate attorney to protect us from the insurance company. It's not fair that my assets are at risk. You also raised a question about small consumers, and how a two or three hundred dollar insurance bill might be affected. I'd ask you a question: isn't that why we have the system of small claims court in this state? Aren't they supposed to be the people where you can go into court if you have a small dispute and argue that, and not have to be represented by counsel? I appreciate your attention.

WOLENS: The reason it doesn't work like that, that I have seen, in small claims court is that whenever you sue, in a car wreck case for example, if your insurance company doesn't pay the total value of your car, if they try not to pay the taxes they owe you, and if you were to sue them in small claims court, they show up with their lawyers. People that don't have experience in the law have a difficult time competing even in small claims court with lawyers. It's just difficult.

ROSENHOUSE: Maybe that's inequity in the Small Claims Act.

WOLENS: No. No, no, no. It is just a problem in the system that will never be settled. Will never, ever be resolved.

RAMSAY: Do you have a question for the witness? Thank you very much.

ROSENHOUSE: Thank you.

RAMSAY: Obviously, did that doctor like to fish? That's what I need to know.

SEIDLITS: We have Mr. Randall Birdwell, with the Texas Association of Builders.

RANDALL BIRDWELL: Randall P. Birdwell. I'm president of Emerald Homes in Houston, Texas. Our company's roots go back to 1954. I'm chairman of the Government Affairs Committee for the Texas Association of Builders. Our association obviously supports tort reform. In new home construction there's about forty-five thousand pieces. They're built on unique sites with a number of independent contractors in an uncontrolled environment. The bottom line is there is no perfect home. This body recognized that, and created what is called the Resident Construction Liability Act. I won't get into how that applies. But I believe that business believes that we have a DTPA bull's eye on our back. Let me just tell you about three claims and some DTPA suits that involved my firm. One, we got sued for a dead tree. We wanted to take the tree down, but the homeowner didn't want it taken down, so they came to me and said, "What do we do?" I said, "Get them to sign a release." They sued us later, anyway.

WOLENS: Did they recover?

BIRDWELL: It was settled under confidentiality.

WOLENS: Did you have to pay? For the portion where they claimed-- about the dead tree?

BIRDWELL: Well, like I said, it was settled under confidentiality. I can't tell you what was paid, based on the confidentiality agreement. I can tell you--

WOLENS: Can you tell us if you had to pay, just based on the dead tree?

BIRDWELL: Let's put it this way. My insurance carrier is generous. Another one: a sloped sidewalk. The sidewalk was approved by the city. Another: dimples in brick. The homeowner had selected a brick that has little thumbprints in it, then later decided that they didn't like that.

WOLENS: So, did they sue you, or did they make a claim?

BIRDWELL: They sued.

WOLENS: Did they succeed or is that confidential?

BIRDWELL: Again, settled under a confidentiality agreement.

WOLENS: So why are you telling us about it in the first place?

BIRDWELL: I'm telling you about it because--

WOLENS: Listen, I don't mind. I would like for you to persuade me. I've found some of these things-- Mr. Royer was very persuasive. Wade Spillman was very, very persuasive on the rules and regulations. I am sold, hook, line and sinker on his argument. However, if you're going to go up with all these horror stories, and there may be some good horror stories out there, I'd sure like to hear about them, and it's one thing to ask for it. A lot of people come to the legislature and ask. Whether they get it is a big part of the story. There's six thousand or seven thousand bills that are filed, and all six or seven thousand won't become law. So I am curious about the dimple or the sidewalk or the dead tree; it makes for a great anecdote. But I am sincerely am interested if

you paid on the dimple in the sidewalk. I mean, I really am. I'm not picking on you. I just want to know.

BIRDWELL: Yes.

WOLENS: All right.

DANBURG: I, too, have found very frustrated situations where insurance companies, rather than fighting on my behalf when I felt like I was being wrongfully accused of something, would not fight on my behalf. I felt like that's why I was paying insurance. But, regardless of personal situations, I've been an ad litem on some cases where it was clear to me the plaintiff had absolutely no reason to be there. I'm representing a kid, so I'm not able to say pour him out. But I have literally seen defense lawyers who are insurance company lawyers, settle completely unmeritorious cases because they wanted to go play golf and they didn't want to have a trial, OK? That doesn't persuade me that the entire act needs to be changed for everybody out there because there are some lazy defense lawyers.

BIRDWELL: Well, I'm not-- may I respond? The point I was trying to make, Representative, was I was trying to point out some abuses. I think these are abuses of the DTPA.

DANBURG: We don't know though, whether you-- they sued on a dead tree. Well, did you promise them something else?

BIRDWELL: No, I tried to elaborate this. There was a waiver by the homeowner with respect to the tree.

DANBURG: Well then, why not just pour them out?

BIRDWELL: Well the problem is--

DANBURG: If it's an outrageous situation, why not make them lose?

BIRDWELL: The problem with business is that you don't necessarily control the settlement process. The second problem is with the DTPA, that's why they went after us. Because of that.

DANBURG: To win in a DTPA suit, the plaintiff has to prove that there was a wrongful something or another that occurred. So, did they prove that you promised them a different kind of brick?

BIRDWELL: No, there was no "knowing" violation at all.

[end of Tape 4, Side A]

[Tape 4, Side B]

BIRDWELL: They recognized the residential construction liability act.

WOLENS: If we did nothing else to it and did that, you guys would be happy.

BIRDWELL: Well, there are other aspects of the DTPA bill as it sits, which we are in favor of. And I think those other aspects have been addressed tonight. I was trying to state-- I went way too long. I was trying to stay brief.

WOLENS: Thank you. I appreciate you clarifying that.

BIRDWELL: Thank you.

SEIDLITS: Any other questions? Thank you.

[Conversation about order of testimony]

RAMSAY: The following were shown to be in favor of the bill: Dr. Edward L. Summers. He represents the Texas Society of CPAs; is that correct?

SUMMERS: That's correct.

RAMSAY: You show in favor of the bill.

SUMMERS: I am. I have written remarks, which with your permission I will point up and bring back at a later time.

RAMSAY: You can give those to the clerk.

WOLENS: I don't think there would be any problem if you wanted to edit those or retype them and send them to us, if that would be more comfortable. I don't think there would be a problem with attaching that to the record.

RAMSAY: ??? We had you already a while ago and he's already testified. Mike Brody, we had him. Peggy Dinable [?], Citizens for a Sound Economy will be showing in favor; is that correct Peggy?

DINABLE: Yes, sir, and I do have ??? ??? ???

RAMSAY: That's fine. Bill Swain, Texas Medical Association is showing in favor. Bill, are you still here? (He had to leave) Larry Forhan of Texas Restaurant Association, in favor. Is that correct Larry? You might have brought us something to eat, which might have helped your cause.

CLERK: Mr. Chairman, Mike Brody called a moment ago. He is here.

RAMSAY: I though we had another Brody. Excuse me, Mike. You're with Texas Association of Realtors in favor of? You want to speak? Good. Step right up.

WOLENS: Ashley, are there are some more people that you want to just recognize?

RAMSAY: OK, let me go ahead and go through this list if you would. If you'd just pick up your ??? that would work. Bob, is it Perry? Excuse me? (I'd like to speak.) OK, well just line up behind this other guy. Robert, is it Howton? Are you going to speak too?

HOWTON: No, sir. I do not want to speak.

RAMSAY: Ashley, did you make this list? This is as confused as what we heard before.

DANBURG: Mr. Chairman, I'm beginning to fear that we are not going to break any records on this in important area of legislation. At this rate, we're going to get out of here before three in the morning Saturday morning.

SEIDLITS: We'll catch that one later on in the session.

RAMSAY: I've got-- let's see, Robert, you said you didn't want to speak? You did not. OK. You're in favor of the bill. Garhart Schuley, did you want to say anything for the good of the government? You want to speak? In favor of from Texas Society of Professional Engineers. George Parson, architect. Excuse me?

PARSON: I wanted to make a brief remark.

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RAMSAY: Ashley, maybe you need to revise your list. [Inaudible sentences] We want to give everybody the opportunity to say all they want to say. Peter Scoggins. I'm trying to see who he's with. Texas Stock and Bond Dealers. Also, Ed Borland? Ed, do you want to speak?

BORLAND: No, sir.

RAMSAY: Are you in favor of?

BORLAND: [not audible]

RAMSAY: Buzz Robinette, in favor of the bill? Mike White. Buzz, who are you representing now, in favor of the bill? Dean Witters. One of the Witters' boys. Mike White with the Greater Houston Partnership and Texas Association of Business of Commerce, Mike are you still here?

WHITE: Yes, sir.

RAMSAY: Do you want to speak?

WHITE: I wish to testify.

RAMSAY: Good. In favor of the bill?

WHITE: Yes, sir.

RAMSAY: Brian Kennedy, Citizens Against Lawsuit Abuse, are you still here Brian? Brian Kennedy? Y'all might have to find out whether he's still here or not. One says yes-- he's not here? He's in favor of the bill. All right, Mr. Chairman, I'll give it back to you. This guy's got his bat and he's ready to play ball.

BRODY: Good Morning. Well, almost. The comment was made earlier thanking the audience for their patience and stamina. I'd like to thank you for your stamina too, Mr. Chairman and members of the committee. My name is Mike Brody. I'm a licensed real estate broker from Colin County. I have the privilege of serving as the 1995 president of the Texas Association of Realtors. Our membership consists of forty-five thousand professionals across the state at one hundred and thirteen local boards. On behalf of the membership of the Texas Association of Realtors, we want to offer, and I offer to you as their president, the full and unconditional support for the efforts of Representative Junell in HB668 to bring back fairness -- not to delete, but to bring back fairness -- to the Deceptive Trade Practices Act and to return it to its original intent as the consumer protection act and not as the consumer extortion act. It's time to-- it's been interesting for me to hear the history and some of the philosophy behind some of the different pieces of the act today. But, I think it's quite clear from some surveys of our membership that it has become a breeding field for frivolous lawsuits over recent years, and it's time to make sure that the consumer also retains the necessary tools to recover when they've actually suffered. I'd like to relate to you the findings of our task force. In 1994 we sent a task force around the state to get input from our members of the abuses relative to DTPA, and what their experiences have been. What we found is that many cases were brought under DTPA that could have actually been resolved through mediation and arbitration. This task force concluded--

SEIDLITS: Mike, did you ask your members why those cases weren't resolved during the 60 day period of letter writing and offers back and forth?

BRODY: Yes, we did. And I'll point out one or two examples in a minute. I think we'll get your other background in that as well. Anyway, the task force concluded that the DTPA was involved in nearly all the unfounded claims and threats of litigation that our brokers received. The current application of DTPA discourages the settlement of legitimate claims because lawyers will inflate or exaggerate damages to the allure and some of the facets of the act. In your opening remarks, Mr. Chairman, you asked for specific examples. I didn't come prepared with those, but we can provide some data on that.

SEIDLITS: I appreciate it.

BRODY: But the number one abuse that we've experienced are repairs after closing. We will go through a process where a purchaser will contract for a property, they will go through a licensed inspector, have him inspect the process, those repairs-- what's found at fault or in need of repair or replacement will be mentioned to the seller, those will be negotiated. They will make repairs, they'll go to closing, and then, months later there may be a claim. Let's say a hot water heater goes out, whether it's under warranty or not. The seller is now in New York or whatever, and who are they going to look to? They're going to look to the realtor. Or the brokers involved.

SEIDLITS: Mike, do you think those disclosure bills that we passed last time will help you?

BRODY: The disclosure bills have been very helpful. But that has not stopped some of the attempts and abuses under DTPA. It still comes under the thread of DTPA. Then we'll involve E&O insurance. First, we'll look to settlement, then we'll look to E&O insurance, and what may be a one or two thousand dollar claim turns into a twenty or twenty-five thousand dollar threat under DTPA, and we know insurance will settle for eight or ten or twelve thousand, but, we don't want to take the risk of going through it, even though we think we have a bonafide defense.

SEIDLITS: Do you think that the realtors would be in favor of what the doctors have in a lot of their malpractice insurance, and that is the right of veto over settlement, in that if I'm the doctor and I'm accused of malpractice and I just say, "I'm not going to pay-- you're not going to pay that claim." I tell my carrier, "You are not going to pay that claim. You're going to defend me in court, and we're going to go through the case." Do y'all have that in any of y'all's E&O?

BRODY: We do not, at this point. That's something we would look at. I think that would be an improvement on the bill as it currently stands. That's something we could look at. I don't want to speak for our directors yet, but certainly. We strongly support the effort of defining professional services as contained in a committee substitute. It in our opinion sets forth a strong policy argument, back to your comments of looking for public policy, why these individuals should not be included in DTPA in the first place. Realtors are, first of all, licensed by the state. Number two, we are subject to mandatory education. Not only to become licensed, but we also have mandatory continuing education to renew our licenses. Number three, we are subject to disciplinary actions by the Commission that can lead to suspension or revocations of those licenses. We are required to pay into the real estate recovery fund. Part of our license renewal fees goes to a fund which allows it. If a customer or consumer or client has been wronged and they can't recover from the entity seller or the broker, and they are found to be at fault, and you know it's not there, there is a fund we pay into to protect the public as well. Most of our members carry E&O insurance. Number six, we are subject to common law theories: negligence, fraud, misrepresentation, breach of fiduciary duty, breach of contract, and so forth which others we have discussed today. Number seven, we nearly always execute a written listing agreement or buyer's representation agreement that provides for attorney's fees and court costs in those documents in the event of disputes. Number eight, we are required to use state promulgated earnest money contracts which provide for mediation and the recovery of attorney fees and costs of the event of a dispute that may survive closing. So the argument that a consumer will not have recourse against a real estate broker is outlined in HB668 or SB26 that proposes to take away their rights is just not correct. That is wrong. The courthouse doors will still be open, the Commission will still monitor us, the contracts will still be adopted by the state, E&O insurance will be available in most cases, and so forth and so on. Additionally, those licensees that chose to be a member of the National Association of Realtors subscribe to a very strict code of ethics. A client may file an ethics complaint through a local board or request arbitration that the realtor is obligated to proceed under if it involves monetary claims. We've seen other states take a progressive action, the Florida Legislature for the same policy reasons that we're discussing today; in 1993, specifically, exempted real estate brokers and salesman from their DTPA bill. And California's unfair Trade Practices Act applies to real estate, but emphasized injunctive relief in private actions. It specifically excludes any reward for exemplary damages. The issues as we see it, and we agree that the pendulum has swung too far. We're just trying to get back to a level

playing field. Balance and fairness for all. The key issues are of course, economic damages, showing of reliance, the professional services definition that I eluded to, definite admission of "knowingly" which has been discussed, and also the joint ??? We really appreciate your serious consideration and attention, obviously, by your long presence here today to this very, very important piece of legislation. Any questions?

SEIDLITS: Any questions for Mike? Representative Danburg has a question.

DANBURG: Were you practicing real estate several years ago when particularly in California there were a bunch of lawsuits against realtors, in some cases for disclosing whether the seller had AIDS, in other cases for refusing to disclose the seller had AIDS?

BRODY: Yes, I've been in real estate for twenty-two years.

DANBURG: Are you aware of any lawsuits regarding that Deceptive Trade Practice?

BRODY: I'm aware that there were lawsuits, yes.

DANBURG: Are you aware of any that are going on now in Texas?

BRODY: No, I'm not. Not personally.

DANBURG: Do you know why that is?

BRODY: No, other than there's been legislation at the national level as well, regarding whether that needs to be disclosed or not, whether it's considered a handicap situation, and so forth. But, I don't know if they are having any.

DANBURG: You need to coach your witnesses. There is a Texas bill that passed that completely removed y'all's liability in that regard. That I passed. The organization ought to appreciate.

BRODY: I thought I said state and national. Thank you.

SEIDLITS: Any other question for Mike? Thanks, Mike.

BRODY: Thank you very much.

SEIDLITS: I appreciate it. I've got somebody here that wants to go, too. Is Earl Rollins III here? Mr. Rollins has to get back to Dallas, I guess.

EARL ROLLINS: I'd like to begin. Mr. Chairman and committee members, my name is Earl Rollins. I am a real estate broker. I've been licensed since 1967. I'm opposed to the provision in the bill, the only part I want to talk about is excluding the real estate broker from provisions under the DTPA. I've been a realtor and a member of The Texas Association of Realtors and a past director for the Texas Association of Realtors. I am also currently a real estate instructor, and some of the courses I teach meet the legal requirements for Texas real estate licensing. Those courses are intended to provide instruction in the proper practice of real estate, including ethical and legal responsibilities. The problem that I see, and the way the industry has gone, we talk about how the pendulum is swinging, is that the problem that we deal with in ethical and legal relationships has been in direct conflict with some business practices. Those business practices, similar to any other where bottom line profits seem to be the primary concern and the rights, protections, and remedies of the consumer become secondary to the brokers' interest. I would submit to you that each of you probably has at some time in the past used a real estate broker, either to buy or sell a house. If you have, I would ask you to seriously consider whether you were absolutely, positively satisfied with the duties that the real estate broker provided you, especially with regard to loyalty and placing your interests first and foremost among any other parties. If that's the case, if you believe-- Yes, sir?

SEIDLITS: Are you with an agency that represents buyers only?

ROLLINS: Yes I am. But, I'm here speaking on behalf of myself as a real estate broker. I'm immediate past president of the Texas Real Estate Buyer Agents Association.

SEIDLITS: But you represent buyers only -- you don't handle-- ?

ROLLINS: Yes, sir. I represent buyers only. I've been in the seller-only end of the business for over twenty years. So I've been in both sides of the real estate business, so I can understand, hopefully, how practices are supposed to be done on both sides.

SEIDLITS: But leaving the real estate broker in would benefit those that you serve and earn your living from. Is that correct?

ROLLINS: I didn't understand the first part.

SEIDLITS: Leaving the real estate professional in the bill would benefit those who use-- or, that is, the buyers.

ROLLINS: No, not necessarily. I'm opposed to unethical or wrongful practices on anybody's part.

SEIDLITS: That's not my question. My question is you want the real estate broker to be kept in the bill?

ROLLINS: Yes.

SEIDLITS: OK. Because you represent the buyers only. Buyers, their remedies could be against the real estate broker who acts as the seller's agent, correct?

ROLLINS: No, not necessarily. No. I believe in proper real estate broker practices.

SEIDLITS: We all believe in that. I'm just trying to find out your interests.

ROLLINS: My interest is primarily to the buyer, yes. But I'm also very concerned about improper practices that are put against the seller by real estate professionals. As I said, I teach real estate practices, and I see the issues on the seller's side much more extreme than I do on the buyer's side. I don't want to take a whole lot more time, other than to say that I would simply urge you to vote against excluding real estate brokers from the accountability section. I think that any of the real estate brokers either in this room or in the industry who profess to be concerned with ethical and legal practices will support accountability. I'd like to read to you a couple of brief things. One from a book called *Not One Dollar More*. It's a consumer book. It says, "Whether he calls himself an agent, broker, realtor, consultant, associate, or salesperson, any individual whose job it is to sell real estate is a professional. Typically he'll come across as courteous, respectful, warm, friendly and non-threatening. That's professional. But one thing he is not is your friend. Neither should you see him as someone in whom you can openly confide. His goals are not yours, neither is his loyalty or confidentiality." Now, those are some extreme statements. I'd like to follow up on one additional thing that I would say would support how a truly practicing professional realtor would not object to remaining in the DTPA. Mr. Brody pointed out the requirements that we have to adhere to the code of ethics and standards of practice. I'm going to read to you one simple paragraph in the preamble. It says, "The term realtor has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct and business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal." This is an ideal, but it certainly characteristic of real estate people who hold themselves as being professional and concerned with legal and ethical practices. To remove the real estate broker, in my opinion, under the Deceptive Trade Practices Act is simply no more than a license to be deceptive. Thank you.

SEIDLITS: Representative Ramsay has a question.

RAMSAY: I'm sorry. I forgot your name.

ROLLINS: Earl Rollins

RAMSAY: Mr. Rollins, it's late and maybe I didn't understand, but you're a real estate broker, and you are for real estate brokers being added or kept in this bill so they'll be subject to all the penalties that can be brought against them by their customers?

ROLLINS: I'm not suggesting that the Deceptive Trade Practices Act doesn't need some modifications. I am simply saying that in the new bill or the proposed bill that in my opinion you should not exempt the brokers, real estate brokers from liability.

RAMSAY: Do you believe what you read out of that book?

ROLLINS: That's why I said that was an extreme statement, but this is a consumer book written to consumers.

RAMSAY: I asked you if you believed it.

ROLLINS: I wouldn't say I believe all of it, no.

RAMSAY: Do you believe part of it? Fifty percent of it?

ROLLINS: I sure do.

RAMSAY: So in general, what you're saying is the real estate profession in this state is not very honest.

ROLLINS: No, I'm not saying that. I'm saying that there is a--

RAMSAY: Would you read that article to me again, please?

ROLLINS: Certainly. The heading of that chapter is called, "What You Must Never Forget About the Agent." It begins with, "As you prepare to put into practice what we have covered so far, you will greatly increase your chances of making money by keeping in mind the following points. Whether he calls himself an agent, broker, realtor, consultant, associate, or salesperson, any individual whose job it is to sell real estate is a professional. Typically he'll come across as courteous, respectful, warm, friendly, and non-threatening. That's professionalism. But one thing he is not is your friend. Neither should you see him as someone in whom you can openly confide. His goals are not yours, neither is his loyalty or confidentiality."

RAMSAY: I've been a broker since 1968, and I take exception to that. I don't carry Errors and Omissions insurance. All I do, except serve you in the state of Texas, is sell real estate. I've never needed Errors and Omissions. In fact, I don't know many people in East Texas that can afford it. But I know a lot of brokers that I compete with, and they end up being not only friends after the sale, but they also continue to serve the client after the sale. It may be different in Dallas, but I resent the fact that you paint us in that corner. Even though you are a broker and you're painting yourself.

ROLLINS: Again, I'm-- don't shoot the messenger. This is not my message. I think that it's representative--

RAMSAY: Wait a minute. Who's is it, if its not yours?

ROLLINS: It's not my book. I didn't write the book.

RAMSAY: Well, you brought the book.

ROLLINS: I brought the book and I recited it, and I said this is an extreme position. This is the position of a consumer writing a consumer book about real estate practices. It says *Not One Dollar More: How to Save Three Thousand to Thirty Thousand Dollars Buying Your Next Home*.

SEIDLITS: But isn't it true that's why they hire you, to represent as buyer-only, so you can stop that smiling, caring individual when he asks you to negotiate hard ball tactics with him so you can get the best deal for the buyer for a few dollars less or more, right? That's why he's paying you. You're making representations to that guy that you will get the lowest price available for that property. So, you have a level -- forgive me members -- a level playing field because he hired you, and somebody else hired him and that's the way the system goes.

RAMSAY: Well, it worked for years, Mr. Chairman, without these services as a buyer's representative; it's worked for years. Then we come along in the state of Texas and decide that all those brokers all those years, until a few years ago, didn't quite represent both parties, and there were a lot of people who weren't satisfied. I never met any of those people. I don't know any of those people. And as I say, I do it every day of my life. I think you grossly misrepresent my part of the business when you read something like that, and I don't appreciate it. Thank you, Mr. Chairman.

ROLLINS: Understand, again, I simply was trying to give you information that is in the consumer arena. Whether you accept it or not, that's not what I'm here to try to do. I'm simply trying to point out--

RAMSAY: You don't want me to accept that?

ROLLINS: That's your choice if you want to accept it. I don't really care. That's not what I'm here for.

RAMSAY: And you weren't here testifying trying to get us to believe anything?

ROLLINS: I am simply here making my opinion known, that I believe that the real estate broker should not be taken out of the Texas-- under the Deceptive Trade Practices Act. That's all I'm saying.

RAMSAY: But you want us to believe what you say, don't you?

ROLLINS: Yes, I do. My opinion.

RAMSAY: And you would testify that that's the truth.

ROLLINS: Well, again, I tried to clarify it by saying that this was an extreme position. I'll be glad to look through here and read some other comments if you'd like to hear some others.

RAMSAY: No. Go on and sit down.

ROLLINS: Thank you.

SEIDLITS: You know what it feels like to be a lawyer now. It's not pleasant when they talk bad about you.

RAMSAY: Mr. Chairman, just think, we went through all of the trouble to make Texas safe for bankers and lawyers and real estate brokers over the years, and here we are messing it all up. We're going to make it safer for lawyers now.

SEIDLITS: Let's see. Is Larry Forhan-- he already left? Bob Perry? Bob's going to speak. OK.

BOB PERRY: I have written down here good afternoon. My name is Bob Perry, Jr. I'm a professional engineer as well as the owner of Roger Bulletin of Texas, Incorporated, a thirteen-year old residential foundation repair company. I'm here today personally and as a representative of the forty-thousand Texas members of the National Federation of Independent Businesses to endorse the Texans for Lawsuits eleven-point program.

RAMSAY: Before you get going, would you mind going down to the parking lot? We've got a crack in this building.

PERRY: Not unless you guys pass something that will allow you to waive your rights.

RAMSAY: We want to see what kind of work you do before we hire you.

PERRY: I'll be glad to look at it, if you'd like. Anyway, I'm here to endorse the eleven-point program, including amending the Deceptive Trade Practices Act. The foundation repair business is both very necessary since estimates of foundation damage in Texas range upwards from one hundred million dollars annually. Also, it is not an exact science, since we're trying to combat the effects of nature after a structure has been built. When you add the fact that only a handful of our competitors employ professional engineers and carry liability insurance, the conditions for taking advantage of the consumer are present. It would seem that the DTPA would be just the ticket to protect unassuming consumers from fly-by-night members of our industry, right? In my opinion nothing could be further from the truth. In fact, this law has been used quite effectively by clients and their attorneys to legally extort significant settlements from only the most qualifying and receptive of firms, including mine. Furthermore--

SEIDLITS: Now why is that?

PERRY: Well, I'm going to tell you.

SEIDLITS: Just tell me how they do that, because I practiced law in the private sector for nearly fifteen years, and I've earned just about every dollar that I got, and I do a heck of a lot of pro bono. And I haven't anybody write a check yet, that didn't do it voluntarily. It certainly wasn't me making them do it for extorting purposes -- they call us extortionists -- by extorting a dollar. Now tell me how these people extort money from you.

PERRY: They put us in a position where we have no choice.

SEIDLITS: Now, who tells you that?

PERRY: It happens.

SEIDLITS: Who tells you that?

PERRY: I've experienced it personally.

SEIDLITS: Who tells you that? Does your lawyer advise you of that?

PERRY: Yes.

SEIDLITS: OK. Do you ever say, "Man I'm right. I'm going to go to the courthouse and place it into the hands of twelve jurors." Why can't you tell them what you want to do? Are you paying the guy?

PERRY: I am, yes.

SEIDLITS: OK. It is an insurance carrier or is it a lawyer that you're paying one hundred and fifty dollars an hour?

PERRY: It's both. Because what happens is the insurance carrier only pays one hundred dollars an hour, so, I pay fifty.

SEIDLITS: I'm just-- I've never seen anybody extort money. There's other lawyers here. There's Larry York he's a good defense lawyer, and I know he doesn't send people down the wrong road. I'm just trying to figure out how-- that's right. He tries cases. There's a lot of lawyers out there that try cases.

PERRY: But with the law the way it is right now--

SEIDLITS: Tell me what's your chief complaint with the law the way it is right now.

PERRY: The law the way it is right now...

SEIDLITS: OK. Number one...

PERRY: ...puts us in this position where we have no choice. Give me a minute, I'll try and explain how. I've written here how the case normally goes. If you'll bear with me for just a minute, maybe I can show you my perspective.

SEIDLITS: I'm just real tired of eight and a half hours...

PERRY: Maybe we'll all be able to determine if they're extortioners or not, or legal or not, or whatever.

SEIDLITS: ...or six and a half hours of extortion. Because I've just never experienced that. If there are other people out there that, lawyers that are getting money easily for their clients by extortion, we need to stop this extortion.

PERRY: OK, maybe we ought to define what I mean by that. What I mean by that is we pay money when we don't think that we did anything wrong. And we do it--

SEIDLITS: Voluntarily.

PERRY: Not really.

SEIDLITS: OK. Tell me.

PERRY: No, we don't do it really, because the money that's paid in settlement is paid by our insurance company that later raises the rates that we pay.

SEIDLITS: Would you be in favor of a provision for them to write a liability policy in the state of Texas that you had the right of veto over settlement offers?

PERRY: We can, but the first thing we get is a reservation of rights put in the situation, which says that you're probably not covered anyway.

SEIDLITS: Yes. You're right. You're right. So who's making the money off the deal?

PERRY: Right. But our choice is to let the insurance company settle, or run the risk of going through trial, finding one little thing wrong and then we're totally on the hook for it. [Inaudible comment by Danbury] I'm not blaming consumers. I'm not saying that there aren't people out there that are trying to take advantage of other folks. All I'm saying is that it's not fair the way it is. OK, now what I'll read what I wrote at ten o'clock last night and got up at five o'clock this morning to come here. That is the typical DTPA foundation case is the plaintiff's

attorney filing suit naming every deep pocket he can think of that had anything to do with the building, conspiring, buying, selling, or repair of the resident. Notification of our liability insurance carrier usually triggers a reservation of rights letter that says we probably aren't covered, so even though they have a duty to defend us, we may want to have our own attorney. That's where we get into paying the fifty dollars an hour to solve that issue. After many months and tens and thousands of dollars worth of legal wrangling, the case is usually then sent to mediation, which is facilitated by another attorney. The mediation usually does result in settling the case. The mediator hammers away at the possibility of a huge verdict at trial, due to the provisions of the DTPA, until the defendants and their insurers come up with an amount sufficient to satisfy the plaintiff and their attorney.

TURNER: But, the mediator also says to the plaintiff that if you don't resolve this claim you may end up getting nothing. It cuts both ways.

PERRY: I'm not saying that mediation is a bad thing. I'm saying that the setup the way it is now, starts us off at a judicial disadvantage. To put this in perspective, our average repair on a house, when a consumer calls us directly, is about eight thousand dollars. Whenever one of these things is pledged, they're always demanding more than a million.

TURNER: Have you always lost? Are you losing every single time? Don't you win sometime?

PERRY: We haven't been to trial. Can't go to trial. We always lose.

TURNER: Why can't you go to trial?

PERRY: Because...

TURNER: Do you need an attorney?

PERRY: ...our insurance tells me to go through mediation and says, "We'll pay now."

TURNER: But are you represented by counsel?

PERRY: Yes.

TURNER: Then you need to get a better one. I don't understand. If you've got a lousy attorney, get a better one.

PERRY: I don't think I have a lousy attorney.

TURNER: But you're saying you're not winning anything.

PERRY: Well, I guess you could say I'm not losing either. I haven't gone to trial. But I'll tell you one thing, every time my attorney and the other side's attorney walks away with something; they always win. There are occasions when the consumer is involved and probably doesn't win what they deserve or whatever they're entitled to. The fees get in the way. The discovery process gets in the way. Now, we're talking thousands and thousands of thousands of dollars that are wasted, when our primary attempt in the first place is if someone's got a complaint with our work, we want to help them. I've heard people here mention before the demand letter process. That's a joke. I've had cases where the suit's filed first and the demand letter came second. I've had one where it wasn't sent at all until we went and got a motion to make him send one. Now, you can't tell me that an attorney that practices law in this state that does foundation cases is unaware of the novice position of the DTPA. It's just ridiculous. We're talking about the same people over and over again. Now, you can say, OK, well, it's my fault for not trying to take it all the way through trial. It's not my decision most of the time.

DANBURY: Let's say for example, you're being sued under the Deceptive Trade Practice Act.

PERRY: OK. I don't think I've ever done any deceptive trade practice as far as that's concerned. But I think the thing that is important to understand here is what I said in the beginning, and that is our business is not an exact science. We make representations to our customers that we will do certain things. As a matter of fact, the contract that we used to use had a guarantee in it. It was two sentences long. It said if the foundation settles in the area that we work, we'll come back and adjust it free. The second sentence said that it didn't cover original design or construction defects in the foundation. The portions of the foundation that weren't supported by the work that we did. Pretty straightforward. Our current contract, based on good legal advice, says that, it has one more sentence in the guarantee that says something about it's not a warranty of merchantability or fitness for a particular purpose or some legalese like that, and twelve more paragraphs that says what it doesn't cover. I don't believe that I deceived anybody for the time I've been in business. But the difficult pleading is the laundry list that someone else mentioned, and you had him on the ropes about, "Well, what specifically did they say you did wrong?" They never tell you that. You've just got twelve different items on here that are taken out of the statutes that are in the pleading of what you did wrong. I mean, I've been in a deposition where one of the other parties in the case questioned the plaintiff on each individual item. The guy happened to be a former DA and he was rather tough on the witness and that kind of thing, and had him totally flabbergasted. That doesn't matter. They still settled in mediation. Now, what happens is normally we're the third or fourth or fifth party.

DANBURY: ??? ??? ???. You get the demand letter.

PERRY: Right.

DANBURY: I don't know how they file a case before they can have those letters.

PERRY: It happens. I'm telling you.

SEIDLITS: You want the limitations is about to expire or if they file this case is abated for sixty days while you go through the process.

PERRY: I don't mean to dispute you, Mr. Chairman, but there's a blatant disregard for the notice requirement.

SEIDLITS: We're going to have a frivolous lawsuit bill here in just a second...

PERRY: I've got my testimony on that, but I don't know if I'm going to be here late enough.

SEIDLITS: ...then if someone flagrantly disregards the rules, you have a separate cause of action against them for harassment, damages, you name it, it's there.

DANBURY: So they send you in 60 days, and they say...

PERRY: OK, I can give you specific cases...

DANBURY: ...you said you would fix the foundation...

PERRY: Right.

DANBURY: ...And it settled. And you said you would come back and fix it for free. Why don't you just cure the defects and go back and fix it for free like you guaranteed it?

PERRY: Because then the plaintiff will assert that it can't be fixed. That is normally what the situation is. That it can't be fixed. Or that there is a five hundred thousand dollar fix for a five thousand dollar profit. Truth. I'm not making this up.

SEIDLITS: You're probably right.

PERRY: I'm not making this up. Now, if I'm selling it you as a consumer and you've got five thousand dollars to spend, and you ask what I'm going to do, I'm going to tell you I'm going to support this part of your foundation and it's not going to settle, and if it does, I'm going to come back and fix it free, and I'm not covering anything else. I'm not covering other parts of the house, I'm not covering it if it moves up, I'm not covering it if there is some hidden defect in the foundation that I didn't know about, or that kind of thing. I'm very clear. But what it comes down to is you misrepresented to my client that you said the foundation would be fixed. Proof that it's not fixed is that there's a crack in the house someplace. I don't know any of you, but I can tell you I can personally go in every one of your houses and in at least half of them I'll find cracks in. OK. Now it's a question of degree. I looked at a house this morning that I've already been named in the suit that was settled on, and now the builder is back at it again. The house is fifteen years old. We did work with a five year guarantee six years ago. I went out and surveyed the elevations of that house to see how level it was; I compared it to where it was the last time I was there three years ago, and when we finished the work, it hadn't moved and eighth of an inch. There are a couple of cracks in that house, in the sheetrock and things like that. If I had to assess my own work, I'd say we did an excellent job. That's not what's being pled at this point against the builder. That's the point I'm trying to make. Now, I'm not trying to say that the DTPA in itself is bad. I'm also not trying to say that what you're even considering is going to right all the wrong. It's not. But what it will do, getting back to Representative Turner's comments before, when you start with this tremendous hammer of economic, actual, mental anguish, treble damages and all the rest of it, I mean, we're looking at millions of dollars on something that we maybe received five or ten thousand dollars for. To me, that's just not right. Now, when we go out and we go to try and fix something, I mean, even if it doesn't work, it still isn't fixed. I can't see that that makes us-- should make us responsible for millions of dollars worth of damages. It just isn't right.

SEIDLITS: Did y'all ever settle one for over a million?

PERRY: No. We settled it-- we've been part of a settlement suits for -- this is one of those confidential things; I can't tell you who it was.

SEIDLITS: Don't tell us then.

PERRY: It seems like it was two hundred thousand.

SEIDLITS: Anybody else have any questions for Bob? Thank you very much. We appreciate you coming up here. Your organization does a lot of good.

PERRY: Thank you.

SEIDLITS: We're going to take a break and move to-- where did Uhard [?] go? Is Tom Uhard here? OK. We'll take one more witness then. We were going to go ahead and take this bill up but--

REP ?: I think he would probably appreciate your laying it out.

SEIDLITS: We'll lay it out. Thomas P. Terrell. Is Mr. Terrell here? He registers against House Bill 668. Go ahead, Mr. Terrell.

THOMAS TERRELL: Distinguished chairman, honorable members, my name is Tom Terrell. I am from Grapevine Texas. I am a real estate broker of some twenty-four years. I am a member of the Texas Real Estate Commission and Broker-Lawyer Committee, but I do not represent them or any of its' members in any capacity. I am a real estate educator. I have written a book on Texas real estate agency that is used in numerous colleges and universities in the state, and I teach regularly and appear as an expert witness in real estate agency lawsuits. I would like to further say that not only do I not represent the Real Estate Commission or broker-lawyer committee, but I don't even represent my wife. My wife is the education director of the Dallas Association of Realtors. So this testimony may cost me dearly. I don't even represent my son, who is an

attorney who hasn't spoken to me for two weeks. I do represent only myself, and I know that the proponents of this bill are honorable, ethical people that are arguing for interests of their constituents. I know personally Mike Brody is an ethical and honorable man. So I do not question the motives of any of the proponents of this bill, and I only speak to the one part concerning the removal of professional licensees, most particularly, those of removing the broker from liability. I agree with Jim Royer that the DTPA has been abused and misused and that there needs to be some very serious changes in it. But, I do, after observation and having almost twenty thousand over -- not almost, well over -- twenty thousand students since 1976 in real estate classes, most of whom at the time they were coming through were consumers, I had opportunity to hear more testimony about abuses in real estate than anyone who's entitled to in a lifetime. I agree, in fact, I have some sort of paranoia about DTPA because I came in the business in 1971. Two years later, the DTPA was passed. I swore for many years that there was some connection, because I got my license back when all you had to have was a pulse and ten dollars. I did have to take a little test. I studied all day Sunday, all day Monday, took the test Monday night, I got a license and a Lone Ranger decoder ring, and I was in business. I knew very little. I couldn't spell "fiduciary." I thought the agency was the building. Come to find out, I was not the only one in the profession, and that the FTC did a study a few years back that showed seventy-five percent of all consumers thought -- BUYER consumers, thought that the agent that they were working with was their agent representing them, when in fact they were either agents for the seller or sub-agents of the seller, and the licensees never told them as they were required to under the Deceptive-- I mean under the License Act, Section 1586D, they were required to tell them at that time and make clear to them who they represented in the transaction. It was not being done. When I ran the school at the University of Texas at Arlington, I had brokers come to me and tell me, "Tom, if you don't quit teaching that our licensees have to tell buyers who they represent before they start the transaction, we're going to quit sending our students to your classes." We continued to teach that. Later, it finally became the law in 1988 on September first, that that disclosure be made in writing. It has consistently been made very weakly in writing. And my former friends, they probably won't be after tonight, but my former friends of the Texas Association of Realtors and I have done battle every single month virtually for the last six years at the Texas Real Estate Commission as they have sought legitimate protection of the interests of their membership. Nothing illegal or unethical going on here. In legitimate interest, the protection of the interest of their members, they have sought to tone down the disclosures of agency representation so that the buyers and sellers did not and could not truly understand who was on whose side. My opinion was that doing that was a Deceptive Trade Practice. I have written many letters to the Commission, and testified against this kind of activity. I think that the DTPA has increased professionalism in the business, even though it is abused and misused. I think citizens and consumers are on an unlevel field against organized professionals who deceive them. It is a classic David and Goliath situation. But I do not believe that consumers need a tactical nuclear weapon against Goliath. I think an accurate slingshot and a few smooth stones and no law exempting Goliath as an endangered species would be probably adequate. I urge the committee to strengthen the DTPA by balancing it, not by gutting it. No less a person than Jesus said, "To whom much is given, much shall be required." The state imprimatur of licensing of experts by education, testing, and licensing should not act as a shield for deception. If this act is passed in its contemplative form, it is my understanding that approximately ninety different professions will be exempted. The only one I am concerned with at this time is the brokers. Earlier on another issue, lawyer Waggett asked what's wrong with this picture? I don't have photos of hope and health to show you, but I ask you to look at the picture of a licensed professional dealing deceptively with an individual consumer. I'm not talking about those good licensees who have gained friends and done their practice legitimately. The DTPA should not be considered as a harm to them. As you mentioned, you've never been sued under it, so you are to be congratulated, sir. In that picture, I'd like you to see the consumer being disarmed of their current primary statutory rights to seek a remedy for the damages resulting from the deception by profession. The unique part of what I have to say comes now. That is, coupled with another bill that is moving along another course, House Bill 1088, addresses allowing real estate brokers to be intermediaries rather than agents and fiduciaries. Mr. Brody testified that there were several reasons that these revisions were appropriate because the consumers were protected by virtue of education for license, and the loss of license, which incidentally, only hurts the broker; it does not help the injured party recover anything. Unless revenge is very, very sweet indeed, that's about all

that amounts to, so it doesn't help the consumer. The recover fund, if they don't have the DTPA, they've got to go through the normal lawsuit procedure anyway and get a judgment before the recovery fund can even be tapped, and it has a very limited amount. The current limit-- someone? I have a mental block on that right now. But someone from the commission if they're here can enlighten us on that. It's not in excess of \$60,000. The code of ethics that was mentioned in the National Association of Realtors, has been revised three to four times since 1986, when NAR achieved it's highest pinnacle of professionalism in stating that dual agency was the professional equivalent of Russian Roulette, and it was simply not an acceptable form of business practice for a prudent real estate broker to undertake as a matter of law. Those are exact quotes from *Who Is My Client* by William D. North, who was then the executive vice president of The National Association of Realtors. Since then the NAR, because of pressures from large brokers for anti-competitive kinds of legislation, have reversed that 70 year ascent into professionalism, and have decided to attempt in every state of the 1992 presidential advisory group report from the NAR to abrogate the law of agency in all fifty states. We are on the hit list right now. You have been targeted as about the seventh or eighth state to fall to this ruse. Mr. Brody mentioned that they have the other common law remedies of the breach of fiduciary duties. Under House Bill 1088, those common-law duties will be abrogated by that very bill. And so what will happen is on one hand, the consumers will be deprived under their remedies under the DTPA, and on the other hand, they will be stripped of their ability to have fiduciary duties owed to them in a real estate transaction. I think for those reasons, that exempting real estate brokers from DTPA, coupled with House Bill 1088 will turn the Texas real estate brokers license into a homeowner's equity hunting license, because under that bill they will have no duty to protect the equitable interest of their "clients." In fact, I don't know if they'll be able to call them clients, since the intermediary will have to be neutral, or should be, although the first bill I saw said only honor. It didn't say they had to protect anybody's interests. Unless we are very careful, the magician deceives us not because he's evil, but because he's an expert at what he does. One of the ways he deceives us, often to our own amazement and amusement, is to do one thing with one hand, while he's doing something else with the hand we really need to be watching. Right now, HB1088 is the other hand. If we don't see HB1088 coupled with the Deceptive Trade Practices Act, and see the tremendous damage that will result, consumers in real estate transactions will be severely adversely affected, especially, Representative Ramsay, sellers -- not buyers. Because the sellers are typically, if they are being misrepresented as to what the agent's duties are to them, and they go into this trusting agent, the agent deceives them, and normally would be subject to the DTPA, if they don't have the DTPA, remember, the seller is moving. He won't be there six months from now. A year from now, two years from now, three years from now, to try to fight to recover his lost equity because of a deceptive agent. So, the DTPA provides the only meaningful remedy, as Representative Turner talked about, if it can't be used, if the medicine is too high to reach, it isn't a remedy. If the seller has already moved from one venue to another or from this state to another, then he will, with only great, great inconvenience, have the remedies of law. Whereas, under the DTPA he could very easily get action before his move date and before he was irreparably damaged. I think that is a very, very good reason for the consumers who are sellers in this state to be very, very opposed to these changes, to the exemption of professional licensees. But I do agree heartily that the DTPA has been abused and overused for some situations, and that's a story for another time. But I do also agree that (if I could find my notes here on it) I agree with Representative Turner that those remedies must be available. I agree that they have been under this current act; they will be reduced (and I'm missing the list that I need. Let me-- if you'll grant me a second here, I'll recover it. Here it is.) As I see it, I am an educator professionally, but I also hope that I am a good student and I believe I learned some things, and I know I learned many things, I hope I learned the right lessons here. But from the testimony of the proponents of this bill, and your astute questions, I determined a number of things that for the consumers at least, this bill says the damages are lowered, the burden of proof increased. Many of the most likely deceptive entities are completely exempted, brokers, attorneys, etc., and 88 others. Many of the instances of wrongdoing will be removed from this bill. Consumers cost to recover damages from deceptive business practices are increased. Fewer consumer will therefore not seek a remedy for the wrong done them. It basically turns the Consumer Protection Act into a professional deceptive opportunity act. It further increases cost to the consumer by requiring mandatory non-binding mediation as an intermediate step. It favors the deep-pocket hamstrings, the home seller who must leave the area because he's moving. It's anti-taxpayer, anti-lower income consumer,

anti-minorities, which are disproportionately represented in the lower income levels, and it discriminates against the handicapped. Thank you.

SEIDLITS: Any questions? Thank you. Appreciate you coming up. We're going to leave that bill sitting there for a minute, so we can accommodate-- leave it pending for a moment, and we're going to lay out House Bill 1527 and recognize the speaker pro temp, Mr. Muher.

[Tape 4, Side B to end on HB1527]

[Tape 5, Side A]

CARSON: My name is George Carson, and I'm a lawyer from San Antonio. I'm a sole practitioner. I've been practicing law since 1964, and part of my representation is architects. I'm up here as a citizen and an attorney. I'm not here for the Texas Association of Architects or in behalf of my client. Because of the fact that in my representation of architects from 1971 to the present, I've seen the impact of the Texas Deceptive Trade Practices Act. One of the things that bothers me, it's going to be a barrier to young architects trying to start out a practice and climb the scale to take part in this great American pie to move forward. I say that because y'all are asking for reality, and I'll give you reality. Under the Errors and Omissions policies of the architects that I represent they get to select their own attorney. I've built a reputation and so they select me. But they are declining dollar policies. So you're faced in a dilemma as an attorney of a defense attorney. Any motion you make to spend money to defend that client is a dollar less that goes to that architect if he has the judgment or settlement forward. So what does it cost? Fifty thousand dollar deductible, a half a million dollar policy for fifty thousand a year. If you haven't sat and looked at an architect who told you that my son's in college and medical school, and my premiums for Errors and Omissions has climbed to be twenty percent of my gross. I didn't have thirty thousand dollars to pay up front, and just been sued for \$1.5 million in a death case. He's sitting there, that everything that he's worked out that he came up from and worked his way through the University of Texas to get there, is looking at it. Now, I got him out of the lawsuit very simply. Quit playing lawyer games. I called the plaintiff's lawyer up and said, "Don't ask me one interrogatory or take one deposition. I'll give you everything that I've got." But it still cost him fifteen thousand dollars to get out of it. It's the first time in my life that I've represented an architect that told the owner what to do, the owner failed to do it, and he gets sued for a death case. Now, I honestly believe, and I came here as a lawyer, as a profession, I'm worried. We've fought two revolutions to keep the trial by jury in front of us. It's one of our grievances that we had against the English that we did not have trial by jury. If you read the Declaration of Independence of Texas, one of the main grievances they had was that the jury system was not allowed. I'm very worried where we're headed as a profession, because I believe in juries. I believe that if you take honest people and put them in a jury of any race, creed or color, and you tell them the story, and you tell them the facts, and they'll ascertain the truth. But what do you do when you get to the point and the first meeting, the plaintiff's lawyer tells you, and he's representing some of the wealthiest people in town, "I want your policy limit, and I'm going to get your policy limit." When your architect-- at the end of that job there was a leak in the northwest corner, met with the contractor, subcontractors and owner, offered a solution. It seemed to work. He tested it, and it worked. Didn't hear from anybody, and these are his friends. Four years later, call him up and said, "We have a meeting." Walk in and said, "We've hired a lawyer. Unless you fix our building, it's leaking, we're going to sue you." So he comes to me. I said, "Look, it's four years later. Let's write a letter and tell the owner. We want to get the general contractor in the same room. We want to hire a third party because our first solution didn't seem to work to offer as a solution to fix it." The response? the Deceptive Trade Practices letter. Sixty days. You work for a year and a half designing the building, another year to build it. Can you solve it in sixty days? No. I would agree, most owners will give you an extension of time. In that case, I happened to in discovery find out they had seventeen million dollars worth of property. I thought I could get a twenty five million dollar exemption. Try to go after and find that and get a stack of papers that half of their assets are in oil and gas scattered in forty counties all over the state of Texas, and you'll find out what it costs to go to that exemption to find that out. So I found the twenty-five million dollar exemption, and for any of us that have done divorce cases, you know how appraisals come in. You just can't take the basics that somebody-- all of a

sudden, you get up to twenty-three million and you go from there. The other thing that happened to me is you get an expert. My defense has always been, because I have defended personal injury cases when these experts are doctors, when I defended personal injury, the first thing I would try to find out is if that plaintiff was hurt. If the plaintiff was hurt, we'd try to settle the case. If the plaintiff was not hurt, so that I wouldn't waste time on depositions, get an investigator to investigate the expert that's going to testify for the plaintiff. I found out, in one case, he lied about his resume. He never graduated from college. Another one, "post work at MIT." It turned out to be watching a video tape that was put on by MIT. The next one never sealed his drawings in his life. Then, forty-five days out, before trial, you get a designation of another expert. The general contractor on the original job said that he can completely repair the job for a hundred thousand dollars. Where does this expert come in? Seven hundred and fifty thousand dollars. Your coverage is five hundred thousand. I've got a book of two thousand. You go to the court and say, "Your honor, they've designated the expert late"? No. Under the new case of The Supreme Court, you've got to get ready. I spent forty-five thousand dollars in three weeks to get ready, because I had to get an expert out of Houston that between the Astro games had pulled up the floor and put it back. I found out that that expert on the other side had a primavera program. A construction program that cost ten thousand dollars. He borrowed it from somebody. So when you get ready to go trial, and you're looking there and you ask the questions to the insurance people, you turn to your client and say, "Look, I can win this lawsuit. I've spent a lot of time. I've got an expert who's a graduate of Rice, a graduate of Princeton, 25 years old and was president of the Texas AIA, at 28 was president of AI. But let me tell you what's going to happen to you. If that jury comes in on the DTPA, that law firm has already built up their fees to six hundred thousand dollars." How did they build them up to six hundred thousand dollars? You ask them, "Let's mediate." "No. I've got to file a motion and go before Judge Gonzales." I know Judge Gonzales and every lawyer in Bexar county knows that Judge Gonzales is going to make you mediate. How do they look at their fees? Senior partner talked to junior partner. Junior partner talked to junior partner talked to paralegal, paralegal talked to the other one, and the next thing, you're up to six hundred thousand dollars. Try to find a lawyer that's going to testify against one of the most powerful law firms in San Antonio that their fees are unreasonable. You're on the phone. They've got a Harvard lawyer who's going to come in and testify that those are reasonable fees.

TURNER: Is that a good lawyer?

CARSON: Pardon? The other thing is, that sixty day letter. What happened in construction is that when there was a problem, architects and general contractors were problem solvers. They got together to try to work out a solution. The Deceptive Trade Practice Act when it applies to architectural practice puts everybody in an adversarial position. Your client calls you and says I got a DTPA letter, you've got to turn it into the insurance company. It's now a claim. You can't say anything. Be careful instead of trying to solve the problem. The one thing I saw on that bill, because I'm being honest with you. I'm not up here on the eleven point situation. I saw in the bill that if you carried Errors and Omissions, you are out of the DTPA as a professional. To be honest with you, that kind of worries me, because of the fact that we're cutting-- I know it's a good policy argument, but I think of all those people that are starting in the practice of architecture. They can't afford fifty thousand dollar premiums. They're going to be subjected to the DTPA. I don't like wealth coming in and being the criteria of the law. I like the fact that if you're going to take architect out, it's their conduct. Let's be honest--

DANBURG: One of the things that Chairman Seidlits and I looked at a little earlier is we'll start a new cottage industry of insurance providers that will do Errors & Omissions and have a policy limit of five thousand dollars and pay four thousand a year to get it.

CARSON: What you have gotten for the consumer, that may be true. But the fact is that Errors & Omissions policies, I've never tested them yet. They'll tell you you're not covered by the Deceptive Trade Practice. That's the other part of it. The other thing in that sixty day letter that I wanted to tell you is, the practical matter that just hit me. I just got a sixty day letter on an architect, and I got to thinking about it. If I accept it, and the insurance company with a fifty thousand dollar deductible, so we have to pay fifty, insurance settlement says fifty, "we don't

cover Deceptive Trade. Therefore you must settle the entire lawsuit. We won't pay you a dime under the Deceptive Trade." So when I responded, I had to say, "We will pay you this, provided we get a complete release from your contractual claims or negligence claims." Now, I don't know if I'm at the DTPA. Because when you respond, all you do is settle the DTPA claim. You don't settle anything else. As a practical matter, most people who get their DTPA claim, they're going to go away. But when the insurance company tells you that we're not paying a dime for Deceptive Trade under your policy, because it's a species of fraud, where am I getting? Really, to be honest about it, my thinking is-- because, I can go through horror stories and horror stories and horror stories. But we don't need them. My thinking is architecture is very unique of all the professions. You start out with a written contract that has been around, and evolved for a hundred years. The owner is involved in the project at every stage. The owner sets the budget, the cost. The cost is equal to the quality and the scope of the project. If you vary either one of them, you're going to have a change. Then the plans are reviewed by governmental authorities to see if they conform to codes. Then the plans are reviewed by a general and subcontractors to bid on. Anybody knowledgeable in construction knows there's no owner that will ever pay the fee to have a perfect set of plans. No owner would ever pay for enough people to be out on a job watching every laborer put in every nail and every brick. It doesn't work that way. Deceptive Trade in its conception does not really fit the practice of architecture. It has been a detriment. It has raised the insurance premiums, and the architects who want their reputations maintained have always taken the position that I represent: if I made a mistake because I'm a human being, I'll go in there, pay for it and get it fixed. The contractors have generally come forward because they know that in many instances you really don't know who's at fault. So historically, the owner picked up a third, the architecture a third, and the contractor a third. Now we're in a situation that the owner is getting more. He can get his building fixed, but he doesn't want his building fixed. He wants his building paid for. He wants to build a million dollar building, have a hundred thousand dollar problem, get six hundred thousand dollars worth of attendance [?] fees, and have his building paid for. On that aspect, it's unfair. It's late, and I thank you. One other thing as a lawyer, if y'all ever do this, or talk about this. If it's an insurance problem, put it in the Insurance Code so I can find it. If it's the DTPA, put it in the DTPA. When you get all of these things so crossed up, I'm going to be sued for malpractice because I haven't found the law. Good night and thank you.

RAMSAY: Unless you have any questions...any questions? Thank you, George. Parker McCullough [?].

MARK MCQUALITY: McQuality, maybe? Is it McQuality? Maybe my writing's so bad, you can hardly read it Mr. Chairman. I'm sorry. My name is Mark McQuality. Is that who you were calling? OK.

SEIDLITS: Just a minute, Mark. Parker McCullough? We show him for, but did not testify. David Lancaster? David with the Texas Society of Architects, he said he's in support, but he didn't testify. Randy Lee? Randy was-- OK. He did not testify, for. Jerry Wade, Securities Industry Association. I think he's here. Did he testify? Oh he did? Karen Neely? Did Karen leave? With the Independent Banker's Association of Texas. Don Ward? With Texas Veterinary Medical Association. The vets. Marcia Jones with the Texas Hospital Association -- Marcia? For. All of these are for. Alex York, Texas Civil Justice League, for, no testimony. Michael Evans Texas Society of Professional Surveyors. Michael.

MICHAEL EVANS: Thank you, Mr. Chairman, and members of the committee. I am Michael Evans, and I'm a registered professional land surveyor. Today I appear before you as a member of the board of the Texas Society of Professional Surveyors. The purpose for which I have come to speak is with respect to the professional services exemption. A perusal of the provisions of the committee substitute bill, which contains the professional services exemption, reveals that registered professional land surveyors are not included. And I say that because under the professional services definition an individual has to be licensed, registered, or certified. They have to be subject to revocation or suspension under a license, and they have to be subject to the occupational tax, which we are not. Frankly, we are the only profession that is not subject to this tax. While we don't necessarily want to volunteer to be subjected to it, we were placed under the

1987 Sales Tax Act and we would certainly be glad to swap. Having said that, Section 2 seeks to define professional services, but the professional services procurement act of 1989 has defined the list of services that the state considers to be of a professional nature, by saying that "the term 'professional services' shall mean those within the scope of the practice of accounting, architecture, optometry, medicine, land surveying, or professional engineering as defined by the laws of the state of Texas, or those performed by any licensed architect, optometrist, physician, surgeon, certified public accountant, land surveyor, or professional engineer. If registered professional land surveyors are excluded by the language in this committee substitute, then those persons who hold dual licenses as registered professional engineers and registered professional land surveyors--

SEIDLITS: Michael, Representative Danburg has a question.

EVANS: Yes?

DANBURG: Is it basically your position that the process of granting the license is the thing that shall protect consumers? The Licensing Act...

EVANS: No, not necessarily.

DANBURG: ...the board, the oversight committees, that sort of stuff, that's what's supposed to be protecting consumers?

EVANS: Well, yes.

DANBURG: I understand that most surveyors are very professional and very responsible and all of that kind of stuff. But say there's a bad egg in the crate. They really do something deceptive. They flat out lie to the consumer. If we get rid of surveyors under the Deceptive Trade Practice Act, what relief do you think the consumer should have?

EVANS: I'm not sure I understand the point of the question.

DANBURG: If y'all are taken out of the Deceptive Trade Practices Act...

EVANS: Yes...

DANBURG: ...They can't sue you under The Deceptive Trade Practices Act. 99% of all the surveyors are ??? well, they've got the licensing, they've got the oversight and all that. When one bad egg really does something deceptive, what do you think the consumers relief should be?

EVANS: Well...

DANBURG: If this bill passed, and y'all were not under The Deceptive Trade Practices Act.

EVANS: Well, certainly the other remedies that have been talked about. I'm certainly not prepared to talk about points of law or remedies under the law, but with regard to the other remedies of fraud and misrepresentation, I think they ought to be able to come at us in that regard.

DANBURG: Do you feel like you have the where-with-all under a licensing agency to be called a professional?

EVANS: I don't think there is a licensing agency out there. Whether it be the licensing agency of the professional engineers, architects, optometrists, or any of them out there that have the where-with-all funded by the State of Texas to go out and police the professions the way they should be policed. However, having said that, as a profession, surveyors are not included; we'd like to be included. That's my point for being here today. I'd like to talk to you about, just briefly, of the 182 [?] practicing registered professional land surveyors in Texas, approximately one half of those

are practicing professional engineers who would be included by the language of the substitute bill. In other words, approximately 1,640 engineers hold the license of registered professional land surveyors. Therefore, if the surveyors aren't added or are not included by the language, then those persons who hold dual licenses as surveyors and engineers will be affected by the provision of House Bill 668 because of their licenses as engineers, but they'll still be subject to the provisions of The Deceptive Trade Practices Act because of their licenses as surveyors if we are not included. So, in summary, according to the Professional Services Procurement Act of 1989, surveyors are professional with the same standing as architects and optometrists, etc. Therefore, my constituents, the people that I represent, ask that the language be altered so that registered professional land surveyors can be included under the provisions of the professional services exemption section of the bill. I would be happy to answer and questions or, at least make an attempt.

SEIDLITS: Any questions? Thanks. Thanks for sticking with us.

EVANS: Mr. Chairman, if I could, I've got all kinds of things that I need to edit here, and I'd like to submit them for the record at a later date.

SPEAKER: I tell you what, if you'll just send them to the State Affairs office, we'll distribute them to the members.

EVANS: Thank you very much.

SEIDLITS: Mark McQuality. Is that right? That's right. Mark is against the bill.

MARK MCQUALITY: Thank you, Mr. Chairman. I appreciate it. I want to first state I am an attorney from Dallas. I represent primarily consumers. I've worked with The Deceptive Trade Practice Act for twenty years. For three years when I was at SMU as a law clerk with the Attorney General's office there in Dallas in the consumer division, and for seventeen years now in private practice. I appreciate all of the committee members staying until this late point in the day. I know that it's been a long day for all of us, but I certainly appreciate your listening to me at this point and time. I've noticed that a number of the speakers, even the speakers that were proponents of the legislation, have backed off a number of the points and the provisions in the copies of the bill that have been put forth so far. I got a copy as recently as yesterday, and it was not the substitute bill yet, but it was the original bill. I believe I have a copy of what the substitute bill looks like because I have a copy of the committee substitute bill, Senate Bill number 26. So I think I'm familiar with the changes that have been made. I've noticed that a number of the witnesses, when they got up here and testified, even the proponents backed off of a number of points. I represent primarily homeowners. I represent a lot of people who don't have the where-with-all to take off work and be here and testify before y'all. Most of my clients are right there in Dallas. I've never been the type of lawyer that goes out and starts shopping around venues and trying to chase after where might be the more advantageous venue to file my lawsuit. Many of my friends when I first got out of law school and was working with the Attorney General's office with John Hill, he gave me an opportunity to work in whatever city I wanted. They told me I was crazy to stay as a consumer lawyer in Dallas because of the generally conservative jurors there. I have found over the years that the consumer protection act was a tool that helped level the playing field. I noticed, Mr. Chairman, before, when you forgave yourself for using that term, I would take it that that is a term that you all have heard a number of times. I find it ironic that it too is a term that I have used over the years. I am a former chairman of the consumer law section of the State Bar of Texas. I'm a former course director of the advanced consumer law insurance course. Our consumer law section, our counsel, our board, our governing counsel is made up equally between attorneys that practice on the plaintiffs side of the bar, and attorneys that practice on the defense side of the bar. Mr. Sheehan, who testified at length earlier today, as you know, represents primarily businesses. By design, we have tried to balance our counsel so that it's not just one portion of the bar that's coming forward and talking. I, again, believe that this Act is wrong. The amendments that are being proposed are unnecessary and will take away the tools that the consumers need to have effective remedies. Representative Wolens, Representative Turner, and others have made the statement that a remedy is not a remedy if it's not available to

the consumers. I can tell you that I'll be unable to represent most of the types of consumers I currently represent on any sort of high-bread contingent or contingent fee basis. Most of my clients cannot afford to pay on an hourly fee basis. The changes that are being proposed I think are wrong. As an attorney I certainly would like the shelter of being exempted from this statute, but I think that's wrong. I think it's wrong to also exempt other professionals that have come forward today. I found in my twenty years or so of working with this statute that most businesses try hard, and most business men and women are good, and aren't out there deceiving people. But unfortunately, there are bad apples. Unfortunately, bad things do happen in the marketplace. I think like we learned in law school, in many other ways there has to be a balancing. Many times there's no perfect system so you have to balance. You have to look at what's appropriate. What's the best public policy. That's your job as legislators. I believe the best public policy is that the victims, the individuals who all they did is pay for goods or services that came out to be different than they were promised or represented, should be the individuals that should have the advantages under this statute as it currently exists. That's the way I think it should remain. The business men and women, even if the misrepresentations are innocent misrepresentations, there still profiting from the venture. There are provisions under the act where they can turn around and sue individuals that caused them damages. The chain before Representative Danburg that you gave about the chain of sales, where do the consumers end? Yes. About the health spa equipment, or the Nautilus equipment. Those are the type of situations that I think are very important. You asked someone-- it's been so many hours ago, I apologize. I'm a little tired, as I know you all are too. But someone asked the question about a small business that was deceived in the transaction also. I formally represented a carpet wholesaler who bought a large quantity of carpet from a manufacturer down in Dalton, Georgia, and then turned around and put it into apartments, which were his clients, and represented that it was FHA approved, and it was the proper standards. In fact, the carpet was nylon as opposed to polyester. In fact, it was polyester. The response that we got from the carpet manufacturer was that it was a mistake. So, to attempt to prove for that client and save his business and say that no, they intentionally defrauded him, would have been a tremendous burden. It would've been very difficult.

WOLENS: Wait, wait a minute. So when your client goes to the manufacturer and says, "You were supposed to give me polyester, but you gave me whatever," why didn't the manufacturer say, "You're right. I was going to give you something else." Why didn't they just make it whole? Why didn't they just swap it out?

MCQUALITY: A very good question, Representative Wolens. I think the answer was that they took the position that it was our burden to go pull from our customers, our apartments, where we put in all the carpet to prove to them that each time that it was polyester as opposed to nylon. They took the position that, "No, we deny it. You go prove it." I understand that's the defendant's right, and it's important the right that the defendant has to say, "Mr. Plaintiff, it's your job to go prove your case." But in this case, it would have required going back and contacting all the many customers in the apartments where the carpet had been in, trying to pull back all of this carpet to prove on a case-by-case situation that all of the rolls were bad. It would have been an insurmountable hurdle. Again, it goes back to if there isn't a true and feasible remedy, then the consumer is without any true relief here. One thing that I've heard a number of times today is that there has been bad lawyering. As a lawyer, I hate to say that I realize that occasionally, and maybe sometimes more than occasionally, some of our brothers and sisters in the profession don't do a good job. I think that happens in every profession. You can't legislate away bad lawyering. The Deceptive Trade Practices Act had since 1973 a provision that if the lawsuits were frivolous and groundless, that the defendants could go in, show that to the court and recover their defendants attorney's fees. That's a safeguard that I believe in. That's a safeguard that--

SEIDLITS: How long has that been in the act?

MCQUALITY: I believe it's been in since 1973, since the initial passage. That is one of the safeguards that has been in this statute. That is a provision that if there are these frivolous lawsuits out there, then the defendants can turn around and sue the plaintiff's, counter-claim against the plaintiff's, and get their attorney's fees. I heard Mr. Weekley's testimony, and I applaud that sort of response. Quite honestly, I've been handling what I call broken house cases

or broken foundation cases probably for the past sixteen or seventeen years since I've been in private practice. I don't think I've ever had to sue his brother's company. I think good businesses respond that way. Unfortunately, not all contractors are that way. In 1989, the legislature passed the Residential Construction Liability Act; that was again amended in 1993. That act, I think as the witness earlier today testified -- the builder, I don't recall his name, I apologize. Yes, sir. That adds new defenses. Before a consumer can pursue their claim under the Deceptive Trade Practices Act, they must give the builder an opportunity to respond and to cure under the RCLA. Unfortunately, what we see is, unlike Mr. Weekley's brother's company, many builders are not responding to those letters. Even if the consumer happens to be savvy enough to know that they have to send the letter certified mail, instead of just saying, "Dear Mr. Builder: Here's the problems that I have," many times the builders aren't responding, aren't coming back. I was pleased to hear the witness testify that he wanted to change that now, because as the language currently is in the Act, I think it is manifestly unfair to allow defendant's attorney's fees in a case that would be covered by the RCLA, win or lose. There is no perfect law ever. I understand that. But our job is to try to make a system that is fair to all. I think the Act as it currently stands should remain. I think that mediation we're in favor of. There has been some discussion about mediation. It is an expensive process. We find that it's most appropriate in consumer cases. There is already under the alternative dispute resolution statute a procedure whereby either party can go in and make application for the court to order mediation. It's been my experiences, in Dallas county at least, that those mediations are ordered. I am an early disciple of mediation. I had the good fortune of working with one of the pioneers in mediation in Dallas, a man by the name of Steve Brushea [?]. I think he turned the Dallas courts around and educated the judges up there as to the benefits and the merits of mediation. Unfortunately, we're seeing a change in mediation. I recently spent a large number of hours preparing for mediation trying to prepare brochures to outline my client's claims. I went into mediation only to be told after a number of hours of working by a very frustrated mediator that the defendant had decided that despite the fact that they said they were there in good faith to mediate, it was against their corporate policy to ever settle a case. So, they wouldn't pay a dime. So, we all have war stories.

SEIDLITS: Did you file a motion for sanctions?

MCQUALITY: No sir. There's case law that says that you can't force the parties to go and mediate in good faith. They can only be forced to attend the mediation. They can't be forced to settle. We're proceeding, and getting ready for trial. The attorney's fees in these cases can get extremely high for both sides. I understand that. That is, unfortunately, a result of the "Rambo" litigation tactics that have occurred. I heard Mr. Perry, Jr. testify earlier today. He smiled as he left, because I've seen Mr. Perry, I've never sued Mr. Perry, but he's been involved as the repair contractor for a number of home builders that I have represented, clients that have bought homes from him that were defective. Mr. Perry talked here about his warranty. I recently was involved in a case where a foundation was cracked, the response of the builder first was to deny that there was a crack and that there was a problem. After the problems continued and they could no longer be denied, he came back and put in a french drain to try to eliminate the water problems. That didn't solve it, so finally after about a year of trying by my recently widowed client, they came back and proposed a ??? repair. That's the time that I got involved, because she still questioned, she still had other engineers sayings, "This is wrong. This repair would be a joke. The problem with your house is that water's getting to it and it's heaving. This repair proposal only addresses settlement." One of Mr. Perry's engineers came out, reviewed the plan and said, "You're right. I don't know why this proposal was made." That's the sort of battles we're dealing with all the time. Unfortunately, people aren't always reasonable on either side of the docket. I'm not saying that every consumer case that has ever been brought has merit, but I do not believe it has been abused. I do not believe that the system is so broke that we have to gut it out like is being proposed. Thank you.

SEIDLITS: Any questions? Representative Carter has a question.

CARTER: Mr. Chairman, I'd have to go back on the same question that we've asked the other people that have testified. Those same remedies would be available without the Deceptive Trade Practices, would they not?

MCQUALITY: No, sir, they really would not be. I think that...

CARTER: You mean because it didn't reach thirty thousand dollars?

MCQUALITY: I'm sorry? You mean because it wouldn't be economically feasible for a lawyer like myself? Quite honestly, a thirty thousand dollar damages case, I don't know where Mr. Bragg came up with that number, but that necessarily does not make it economically feasible either. It is a situation where because of a lack of mental anguish in the case, and that was one of the points on my list that I wanted to make. Since I'm tired I am forgetting some of the points. I know you all are, too. But mental anguish is a very real damage, sir, in these types of cases. When you're entire life savings are invested -- I do have one of my clients who has signed up to testify against the act also, Mark Sephane [?], and he'll testify later. But when your entire life savings are tied up in a case, that does cause problems. I've seen divorces, I've seen attempted suicide.

CARTER: OK, let that go. The other thing that you mentioned, in the mediation.

MCQUALITY: Yes sir.

CARTER: The other party wasn't there in good faith.

MCQUALITY: Yes sir.

CARTER: Did it not prove that the first thing the mediator should do is to establish the fact?

MCQUALITY: Absolutely. There's really no power if the party says, "Yes, we are," and then a couple of hours into mediation says, "You know what? We were never going to settle this. It's against our corporate policy." They're stripped of any power to do anything about that. All they can do is report back to the judge if the case is settled or if did not settle. That was the concern, and as a consumer advocate, my entire professional career, twenty years working with this, I was concerned when the ADR statute was first passed. I thought representing typically the little guy vs. the bigger company, David and Goliath situation, that mediation would be used just as a trick to delay our day in court, if that's what it took. Our chance to tell our story to the jury if the defendant wouldn't pay a fair compensation. But I didn't find that was happening. It was a really great tool in Dallas for a number of years. It still works in a number of instances. Unfortunately, I've had a number of mediators, and I mediate -- most of my cases are resolved via mediation or settlement. I've found that a number of mediators are telling me, "You know what? We've got to figure something out here, because the system's starting to be abused."

SPEAKER: We have the same thing about worker's comp.

MCQUALITY: Yes sir. I'm sure.

SPEAKER: Any other questions for Mark? Representative Danburg has a question.

DANBURG: Point two on The Texas Lawsuit Reform eleven-point list is to make consumer protection laws apply to consumers again. This is my file of letters from people who are opposed to this. These are all the letters I've gotten in favor of this. One of the things they say is they're for restoring the Deceptive Trade Practices Act to the consumer protection law that it was intended to be. I've tried to call these people. Those few that I've gotten a hold of say yes they believe that. But when I say, well do you think that consumers of legal services should not be protected by the Deceptive Trade Practices Act, they don't agree with that. When I ask them about some of the other provisions in this, point by point, they don't agree with that, you know, with the individual points that are in this bill. I think that it's probably important that we talk about the details of it and not just-- and I think you've done a good job.

MCQUALITY: I appreciate that. It's really difficult being in Dallas and not being in the loop all the time. I hear about the meetings that are going on. There are all these good changes that are about to happen. We had a heck of a time at times even trying to find out when exactly the hearings were to get here and to get here. I know you all come from around the state, so you had the same situation, too. But I promise you that I have a number of clients that would like to speak out in favor of this. Unfortunately, they don't have the positions in their jobs or they are hourly workers so they can't just break away. They can't just say, "Oh, by the way, boss I'm leaving on Monday on two days notice, because I want to go down and register my complaint about the proposed changes." I found a terrible lack of knowledge about what's about to happen to them. I have been asked and been on the scene on a radio affiliate station in Dallas the last couple of weeks. I was shocked to see in the call-in show a number of the people just had a lack of knowledge at all about what was happening and what was being proposed. I think the name of tort reform that the Deceptive Trade Practices Act just kind of got swept into that. I think that there is generally a sense that we need to reform our civil justice system in certain ways. But I don't think that this statute is broken. I don't think that this statute should be part of it. I think if the changes are made as is being proposed, I think that once that hits the public, I think there's going to be a tremendous backlash.

DANBURG: Point number nine on the eleven-point program is to limit contributions to judicial candidates. We had a bill last session on that that didn't pass in the final sweep. We had over two years of interim work on it. We had the hearing in my committee on elections last week. There wasn't a single person there from this organization there to testify for limiting contributions to judicial candidates.

MCQUALITY: My clients, I represent a number of working folks and young married couples that are buying houses that are broken and all. I'm in favor of those changes. I think it needs to be limits or else we're going to be in a situation where every couple of years the pendulum is going to be swing hard back and forth. I guess maybe that's another good point that I could bring up. In 1987 we had the tort reform that this legislature passed, and at the same time the amendments were being considered to the Deceptive Trade Practices Act at that time. They said, "You know what? This is not single issues. This is forum abuse. Let's carve the Deceptive Trade Practices out, let's have a joint committee." I went and testified, as many others did from both sides, to that joint committee. After a long number of hearings, not late afternoon one evening like you all have to listen to us here. I believe the recommendation of that joint committee was that there be no changes. That was the way that it was voted out. I haven't seen the evidence being put forth before, and you said, "Show us with clear and convincing evidence, Mr. Chairman, that this act needs to be changed." I haven't seen that. The consumer study that was done by the Deceptive Trade Practice section, the consumer law section, which is equally balanced, came out and showed that there weren't abuses under this statute at that point and time. Now, that hasn't been updated, and I guess that probably needs to be updated to be most current. But I don't know what's changed since 1989 that suddenly we need to gut this act. If anything, our courts have become much more conservative. I don't think there's really much doubt about that, that the interpretations of this statute are much more restrictive than they were before. As an example, there were some proponents out there that were saying that every slip and fall case should be a Deceptive Trade Practice case. There were some speakers at some of the lawyer's seminars that took that position. Certainly, I have never adopted that position and spoken against it. I'm the editor of the general practice sections newspaper which is called *The Digest*, and have pointed out some cases recently where the courts are saying no. The woman went into Wal-Mart to buy a coat for her husband. She didn't go into Wal-Mart to walk on the floors. That's different than the person who bought a health spa membership, and when she's at the health spa, there's defects in the equipment or defects on the track. Those were the services that she purchased. But not the lady that goes into Wal-Mart to buy a coat for her husband. I think the courts are on track on that. Again, I see that the courts are more restrictively interpreting this, and I think in any many instances are interpreting correctly. Therefore, yet another reason why I don't think it's necessary to make a change.

SEIDLITS: Any other questions for Mark?

MCQUALITY: Thank you.

SEIDLITS: Thank you, Mark. We're going to leave this bill pending for a few minutes, and Chair's going to lay out House Bill 185 and recognize Representative Cook.

[General discussion about House Bill 185]

SEIDLITS: OK, we're going to go back on 668, which we're considering the committee substitute. Dane Harris. Is Dane still here? OK, we're going to show Dane for the bill, representing the Texas Association of Business and Chamber of Commerce. Jay Thompson? Is Jay here? AFAC, Texas Life Insurance Association; he is for the bill and did not testify. Joe Bill Watkins? Is Mr. Watkins here? We'll show Joe Bill for the bill representing the Securities Industry Association, did not testify. Dick Trulboise [?]. Dick, he is around here. Does he want to testify or just want to-- I saw him here just a second ago. He says he does not want to speak. I saw him. There he is. Dick, did you want to say anything?

DICK TRULBOISE: Mr. Chairman, last session I spoke in favor of the bill and was never heard of again, so I'm not going to speak.

SEIDLITS: Brock Akers? Brock C. Akers. Mr. Akers is representing the Texas Association of Defense Counsel. Is he here? OK. There's all those. That's all the fors that I'm showing. Is anybody else for the bill? Anybody else for the bill? OK. Nigel Austin Weeks. OK. We'll show Mr. Weeks was against the bill. Mr. Terrell already testified. Mark Kincaid. Is Mark still here? OK. We'll show-- we're moving through this list here. Is it Mark Sephane? All right, Mark. Do you want to come on up?

MARK SEPHANE: Thank you for staying here tonight. My name is Mark Sephane. I live in Dallas. I come here in opposition to this bill. Since it's kind of late, if you'll bear with me, I'll just try and read this.

SPEAKER: How long is it?

SEPHANE: It's short.

SEIDLITS: OK.

SEPHANE: In June of '92 I entered into an agreement to buy my first house. It was to be a great little two-bedroom, one bath with hardwood floors two living areas, a fireplace, a breezeway connecting the house and the garage. It was represented as a move-in in a enjoyable condition, freshly painted with a new roof. Having heard numerous horror stories about everything from foundation to roof problems, and trying to be an educated consumer, I required an owner's disclosure statement and made the sell contingent on the findings of several common professional house inspections. I referred to and hired at the advice of the realtor a constructural engineer, a residential real estate inspector, and a termite inspector. The professional inspectors passed the house with flying colors. Armed with the inspectors reports and the newly received wood-destroying insect report, I made good on my end of the bargain and the deal was closed at the end of July in 1991. I now had my first house representing my life's savings and future earnings for the next thirty years. On or about the morning of November 14th, 1992, I woke up to the smell of natural gas. I quickly contacted the gas company and ran out to the meter and shut off the gas as instructed. After airing out the house, I dropped into the crawl space, my house was pier and beam [?], to locate the source of the gas leak. Once under the house, while trying to maneuver my way around, I noticed some strange looking marks on the floor joints and sub-floor. I pulled a screwdriver from my bag and poked at the wood. To my surprise, the screwdriver went deep into the wood and rebounded slightly. I pushed a little harder on the screwdriver, and heard a tearing sound as the screwdriver disappeared up to its handle. I was surprised, and knowing I was roughly up under the living room floor, I crawled out from under the house and went to see if the screwdriver was visible from above. The screwdriver was sticking up out of the carpeting which covered the supposed hardwood floors. I left the screwdriver and went to complete correcting

the gas problem. Trying to find out why I had this screwdriver sticking out of my living room floor, I pulled back the carpet, exposing large sections of the floor that had been eaten by termites. After much more investigation, I found the following problems with my house: Termite damage to floors, walls and structural members. The roof was improperly installed over three earlier roof layers, and the structure of the roofing collapsing under the weight of this roofing material. The foundation had problems with piers tilted and foundation work that had been improperly done. Termites pier caps missing from the foundation work. Hardwood floors absent from rooms that were advertised as having hardwood floors. Inadequate repairs made to the walls and to the interior of the house to hide termite damages in the living areas. In 1994 my house was declared unlivable by the Dallas County Appraisal Review Board. Entomologists and termite experts have characterized the termite damage in my house as among the worst they have seen. I have in the development of my case learned of individuals who are aware of the history of the house, and who corroborate my belief that so-called professionals did not do their job, and that the house I purchased was not represented to me honestly. This bill would make all of the professionals involved in my house unactionable under the DTPA. It would put the burden of repairing my house, estimated at some \$85,000 or more, on me, not the individuals who deceived me. I oppose this bill because it seeks to strip consumers of the only effective remedy we have against false, misleading, and/or deceptive trade practices, that is the DTPA. Changes to the DTPA as proposed by Senate Bill 26 and House Bill 668 virtually eliminates its usefulness to the consumer protection statute. Under the proposed revisions to the DTPA, consumers who have been wronged by false, misleading, or deceptive acts or practices of licensed or regulated professionals who also carry malpractice insurance or pay into a recovery fund, I will have no recourse under DTPA. This means lawyers, doctors, accountants and the list that we heard tonight. I ask why should these licensed professionals have a lesser duty under the law than unlicensed persons? Senate Bill 26 and House Bill 668 seek to heighten the level of proof required by the consumer to recover under the DTPA. I think we've heard enough about that. Changes to the DTPA proposed by House Bill 668 eliminate the rights of partnerships and corporations that bring causes of action under DTPA. I'm against that because I do not believe mom and pop businesses, who often operate as partnerships or small corporations, may be more sophisticated with regard to their services or items they sell than the persons that purchase the goods, but there are numerous transactions by small businesses operating as partnerships or corporations in which the business consumer is at a disadvantage. Not only would private causes of actions be stripped by House Bill 668, but the Attorney General's Consumer Protection Division would also lose its rights and powers to sue the exempted businesses and individuals. No longer will a city or state agency or the state be able to bring suit under the DTPA. House Bill 668 seeks to repeal the consumer protection law and effects the Insurance Code, Article 21.21, as we heard. The proposed changes of House Bill 668 eliminate the greatly overcharging element of unconscionable conduct. House Bill 668 seeks to limit damages to such things as repair or replacement, loss of earnings, loss of profits, injury to credit standing, recovery for physical pain, mental anguish, loss of consortium, loss of society, companionship, disfigurement, and physical impairments. On a personal note, I have been unable to entertain friends in my house, furnish, decorate, or enjoy more than two-thirds of my house for the three and a half years that I've had it. I wonder every time I pay my mortgage and meet my obligation if that shouldn't be considered mental anguish. In conclusion, if House Bill 668 is passed, the only remedy that consumers will have for false, misleading, or deceptive acts and practices will be common law actions, breach of contract, breach of warranty and negligence and fraud. Common law causes of actions are inadequate to protect consumers. For those who argue that House Bill 668 levels the playing field, I ask how unlevel is it? How many people can understand the legal terminology and arbitration clauses and limitations and so on, in most purchased contracts? Is the level playing field for consumers? If the economic playing field is weighted toward businesses, shouldn't the legal playing field for abuse of that power be weighted towards consumers? Should the entity that sells the goods or services and benefits from the transaction be the same entity who bears the loss if the consumer is damaged by the good or service? Despite the existence of the DTPA, sellers of goods or services continue to employ false, misleading, and/or deceptive acts in a variety of consumer transactions. Only when a consumer is damaged to the extent that they have to invest in a potentially costly legal services is the seller really at risk. Additionally, if the consumer prevails in a DTPA suit, how many people recover? It seems to me it's pretty common, and I've been to several hearings at the courthouse for bankruptcy hearings where, in my particular case,

some of these inspectors had declared bankruptcy, and at the same time, in doing so, went down the hall and opened a new business. Or in the case of one gentleman, had already opened a new business before filing for bankruptcy.

SEIDLITS: Are those guys bonded? Do you know? Is there a provision in the-- don't we have a structural pest control board and all that? It's just a recovery fund, but no bonds?

SEPHANE: For some of these individuals, and I don't feel, personally, that all realtors, lawyers or builders or anything are bad. I think that there are problems in every industry. I'm a technical writer, and I get called worse things than lawyers get called. It could be argued--

SEIDLITS: Don't read too much more, or we're going to call you those bad names.

SEPHANE: I wonder in some of these instances if people are feeling that they are unfairly targeted by the DTPA if they have a problem in their own industry, that should be addressed there, and not to the DTPA.

SEIDLITS: Thank you, Mark. Thanks for sticking around here. Did you have a question for him, Tom? Did anybody else have a question? OK. All right, I think Mr. Austin Weeks walked back in, so we're going to give you a few minutes.

AUSTIN WEEKS: Thank you, Mr. Chairman. After as many hours as we've been here, and y'all have been running in and out, eventually there came a time when I had to run out, too. I appreciate your consideration. Mr. Chairman and members of the committee, my name is Nigel Austin Weeks. I happen to be a real estate licensee in the state of Texas. I'm a member of the Texas Association of Realtors, also the Arlington Board of Realtors. I'm not representing them, because I feel contrary to, even though Mr. Brody said that he had full and complete support, he doesn't have absolute, complete support because I feel a little differently than he does. I happen to also be a member of the Texas Association of Realtors Professional Standards Committee on the state level and on the local Arlington board level. I don't see very many cases in the Professional Standards Committee, and I am very glad that I don't. When we first had the bill brought out this afternoon, the sponsor was saying that the original purpose of this bill was to get to the liars, the cheaters, and the stealers. There are very few of those, thankfully, in the real estate business. I'm sure there are very few of those in the architect business or the attorney business or any of the other professions that are mentioned in the bill. But unfortunately there are some that do come before me in the professional standards, and I'm sure they violate laws and deserve to be taking a test for that. I don't think it's appropriate simply because we have a few hours of education and pay some money to the state and pay a little bit into a recovery fund every time we renew our licenses, that we should be treated as special individuals and exempted...

[end of Tape 5, Side A]

[Tape 5, Side B]

RAMSAY: Why is that insurance company liable under this bill, when in fact what they did was in supposedly good faith. Because the judge found that so, right?

WALLS: Well, yes and no, that's a good question. Let me address it this way. In an insurance policy, you'll always be given a brochure that describes coverage. The buying decision is made on the basis of whether or not-- of what's in that brochure. An agent who's a professional representing the company, and who's been trained by the company to explain what the brochure says and means, comes out and explains it to you. If the agent who sold the policy came out and said, "I don't understand this policy, I as the agent, do not understand this policy to permit the company to terminate these people and non-renew their benefits after the man's hurt." That's the way I explained it then, and that's the way I understand it today.

RAMSAY: Well, I understand that. But in essence to me what you're telling us is really what we're about here tonight. It's saying when all else doesn't work, you've got this old bill to fall

back on for whatever damage you may have. Whether you made a mistake in signing your contract, or whether you made a mistake in the house builder you bought the house from, or whatever the reason. Even though you signed a good contract that said you needed termite inspection, and you got the termite inspection and that was good, when all else fails, you can always fall back on this law to claim whatever you want to. In fact, that's what you did.

WALLS: Representative Ramsay, let me put it to you this way. What you're saying is, shouldn't the contract control?

RAMSAY: Basically, yes.

WALLS: 21.21 says "no, thou shalt not misrepresent the terms and conditions of an insurance contract." That's the old law. If you misrepresent what's in the contract, the misrepresentation is actionable. All right, that's the old law. Now I want to analogize that in a couple of ways for you. Let's assume that I decide, or you and I decide that we don't like the chairman, and I pay you a hundred dollars to kill the chairman. You and I would reduce it to writing...

SEIDLITS: Don't offer it; they might do it right now.

WALLS: This is a serious point. You and I reduce our contract to writing. Is it an enforceable contract? No, because it's illegal, because it violates public policy, because it's criminal. Contracts are not always the be-all and end-all.

RAMSAY: Yes, but is that analogy pertinent to your case?

WALLS: It certainly is, because...

RAMSAY: Why was the contract illegal?

WALLS: Because the public policy of the state of Texas is, and has been long before 21.21, that an insurance company may not procure a contract of insurance by making false representations as to the content. To do so violates the public policy in the state of Texas. If you get your contract illegally, we're not going to enforce it for you. We're going to hold you to the standard of what you told them, the person buying the insurance that you would do.

RAMSAY: And the person buying the contract has no responsibility to read or understand the contract?

SEIDLITS: Tom, look at it this way, when there's somebody up there presenting the bill and it's a 132 pages, and they tell you something's in it, but you may not read all of the 132 pages and they say, "Trust me. This is what's in it," and it passes, and then you find out six months later in an election, what was really in the bill, do you feel as though you were bound under that vote because somebody misrepresented to you what was in the bill?

WALLS: To a lot of people, insurance is 85% confusion and 15% commission.

RAMSAY: Mr. Chairman, I think we are responsible. Don't you generally have to pay for your insurance premium before you ever see the official policy? You have to make the application, put your money down, and then maybe you'll get the policy three or four weeks later?

WALLS: In health insurance generally you do, but it's not necessary.

SEIDLITS: If you go home, not tonight, but later, just read your auto insurance contract, and you'll find things you never knew were in there, and that, you know, you've agreed to those terms and conditions. Or look at the fire loss policy on your house. It'll scare you to death what they can do. Most of the times, and I'm the worst -- I give fairly good advice, but don't always follow it. I never read that stuff. I'll go and sign the note. People all the time just sign that stuff and don't have any idea what's in it. That's just kind of the way that business, the people that are

doing the selling have these sophisticated contracts, and the people doing the buying just want it and are going to leave. That's the way I found it. I may be off base.

WALLS: Let me add two things to the facts of this case. You'll probably speak to it. The first is, the woman who bought the policy was a lawyer. She was not an insurance lawyer, she was a trust and wills lawyer. She called someone she knew to be a very knowledgeable insurance agent to look over the policy. After they got through reviewing the brochures, she said, "I'd like to see a copy of the policy, so I can verify that what's in the policy is what's in the..." The response was, "We do not hand out blank copies of the policy. You may rely upon what is in the brochure. That's point one. There was a second point in there, but it's alluded me. So, in conclusion on that point, I think that if this bill passed, my clients would have had no recovery. I think that's the point. I think that they paid-- well, let's go to point two. I am a business lawyer. I represent a lady who is an individual who is a franchisee under Hardy's restaurants. She owns eight restaurants in the Panhandle, one in New Mexico. Her business has grown dramatically. She is having trouble with her management. Her margins are getting thin. She determines she needs some computer equipment in order to gain control of the management of her business. She is the sole owner of the stock of this corporation called Jimolett [?]. Hardy's recommends that she buy equipment and software from an outfit called Positran [?]. She buys three hundred thousand dollars worth of equipment and software that is designed to keep track of the information in her business, to reduce it from the cash registers into a computer bank, permit the information to be transmitted from the individual stores across telephone lines into a central headquarters computer bank. From there it's supposed to dump into a program that gives her management reports. From there the same data is supposed to dump over into an accounting system to produce a P&L and income statement. From there, parts of it are supposed to dump on across into a payroll program and accounts payable program. During the course of the purchase, the seller, who is a Pennsylvania corporation, represented that in fact it would do all of these things, that it would produce reports, that would transmit across the phone lines, that it would allow her to cut five keypunch operators off of the payroll, thereby paying for the system. It would allow her, based on their experience of dealing with Hardy's, to cut costs on hard costs, meaning food costs, by four percent and labor by two percent in her stores because of better management. What they failed to tell her was that they had never done it in connection with PCs, that they had never installed it using the accounting system that they gave her, and that they had never installed it in any private business -- that it was completely and totally untested. None of that was disclosed; only the representations of what it would do for her. She purchased the equipment and with her three hundred thousand dollar note, of course, she couldn't pay for it directly. So there was a lease purchase arranged through a subsidiary of the seller with the lease purchase was based out of Florida. Well of course the system didn't work. When she couldn't get it work she called and they said, "Oh, it's not our system. It's your people. They're relying on the old system which you're running side-by-side. You need to disconnect the old system and just rely on the new one, and your people will get the program." She did that, and of course, it didn't work. She ended up in Chapter 11 bankruptcy. She almost went under. We brought suit in Federal District Court in Amarillo against the seller. The lease purchase company that was holding the contract, took judgment against her in Florida, so we were fighting a three hundred thousand dollar judgment down there plus interest. We prevailed in Federal District Court under the DTPA and specifically under section 1746 (B) 5 and 7, which say thou shalt not misrepresent the traits characteristics, uses and benefits of goods or services. Now, what would be my client's rights under this bill? Could we have prevailed under contract? That's an alternative cause of action. Well, no. The contract that was drawn was drawn literally by a bunch of Philadelphia lawyers, this outfit was in Philadelphia, and it waived everything you can waive, and it subjected everything to New York Law to be held in a Florida forum, and basically said that if we wanted to go litigate, we would have had to go to Florida and New York to do so, which we couldn't have afforded to do. Secondly, could we have prevailed under the Deceptive Trade Practice Act? Once again, this same standard that we just looked at where it says you not only have to prove a violation of 1746 (B), but you also have to show that the misrepresentation was made knowingly at the time. Well under the evidence of trial, what came out was the software designer and the sales people thought they could make it work even though they had never made it work. It was only after they got into trouble on this particular installation that they pulled the entire marketing effort and terminated the sales effort and the project. Only then did they learn they couldn't. If we would have had to

prove that the representations were made knowingly to recover, we couldn't have recovered. So, notwithstanding the fact that they had never tested it, notwithstanding the fact that they didn't know whether or not it would work and that they represented that it would, we would have been without a remedy. So under the bill as it stands today, my business consumer would not have been able to prevail, even assuming she could have sued as a business consumer. Her actual damages exceeded five hundred thousand dollars. Of course, it was a corporation even though she was the sole shareholder, and the bill as it stands today would not have permitted her to sue because she is not an individual. She is a corporation.

SEIDLITS: Wouldn't you have been able to show "knowingly" in that particular case if that they represented that it would work, and you could infer actual awareness where objective manifestations indicate that a person acted with actual awareness during discovery you find that it had never worked or never tested it before? You're a pretty good persuader. I would think you'd be able to show that to a jury of twelve good and honest citizens.

WALLS: Well, we could've showed recklessness. We could have showed recklessness, but whether they knew that their representation was false, no, we couldn't have shown that. We could've shown that they did not know whether their representation was true or false at the time they made it, but we could not have shown that it was knowingly false. So under the bill as it stands, she would have been a loser because she's a corporation, not an individual. She would have been a loser because the standard requires you to show-- Now, I'd like to make one other comment, and I'll sit down. The speakers here today have talked about how you should show that somebody has culpability, that they did something wrong, that they had intention to harm. Why? If you represent to me that a computer system would solve my economic ills in my business, and I rely on you reasonably and incur the damage, is the public policy of Texas to put the loss on the person who's responsible for it, or to try and determine whether they knew they were going to be responsible for it at the time they did it?

SEIDLITS: I think the overriding policy as I hear it, or heard it during the last year was individual responsibility. So would that play into the person who's responsible is the seller, Or the person who's responsible as the buyer? What's your opinion on that?

WALLS: Your Honor, I think that -- excuse me, you've been promoted.

SEIDLITS: They make about \$84,000 dollars a year more than we do.

WALLS: I guess it's a promotion, huh? Well, I would look at it this way. I think what it says is that the person that makes the representation has the duty to know the truth or falsity of his assertions. In a sales circumstance, you know the buyer's going to be relying upon what you tell them. So I think the individual responsibility is the responsibility to know the truth or falsity of what you say, and the responsibility not to make the statement if you don't know. In terms of the standards of the DTPA, we still have to show that you falsely misrepresented.

SEIDLITS: Any other questions of Mr. Walls?

WALLS: Thank you.

SEIDLITS: Thanks for sticking around. Sig Usterhouse, AARP, against the bill, does not wish to testify. Thank you. Tom Smitty? Is he not here? He's against the bill. Susan Pittman? Susan is here. I want to mention right now that we tried to contact a lady by the name of Elizabeth O'Nan. She had indicated that she wanted to testify but could not because of a physical infirmity appear here. We had a glitch in the equipment, but we're going to show her against the bill. We did visit with her by telephone in another room for the record. She is going to send us some written comments which we will distribute to the committee. Go right ahead.

SUSAN PITTMAN: Good morning. My name is Susan Pittman. I'm the network coordinator of the Chemical Connection, a public health network of Texans who have been injured by chemicals. The number of chemically injured and sensitive people is rapidly growing as intergenerational

exposure to pollution increases. In 1989 the National Academy of Science has estimated that 15% percent of the population was unusually sensitive to commonly used chemicals. In fact, we believe that if doctors were trained to diagnosis chemical injury, it would be general knowledge that the problem has reached epidemic proportions. The people who are left severely chemically sensitive suffer so much for the rest of their lives that they often wish that the responsible party or parties had been kind and just kill them outright. Principal losses include pain and suffering, mental anguish, loss of consortium, and disfigurement. Currently unrecognized economic damages include the need for specialized housing away from pollution, as well as food and water free from any pesticides for these people's entire lives. Insurance companies generally refuse to pay our medical costs, calling necessary treatments "experimental." There is no justice for the chemically injured in Texas courts today, even under the current standards of proof. Current proposals do nothing to correct the underlying problem. Instead, they encourage irresponsible behavior with regard to the public health and safety, and protect the lawyers who get rich off of the system. The public pays with future injury as well as excess health costs shared through private insurance, Medicare, and otherwise unnecessary disability costs. Most injuries result from negligence -- deceptive trade practices, unsafe practices of which the responsible parties have allowed themselves to be unaware, and general failure to warn the public of the inherent dangers of repeated human exposure to low level mixtures of toxic substances. Our government regulatory systems have failed dismally to such standards adequate to protect public health. So we must rely on the courts. As it is now, fewer and fewer lawyers will take chemical injury cases because they are so difficult to prove. Few doctors are trained to diagnose or treat chronic chemical injury, causing what they do to fail the reasonable and customary tests. Instead, doctors who can recognize and treat chemical injury are subjected to ridicule in the adversarial environment of the court and the testimony of ignorant doctors is readily accepted as fact. Science has been unable to tell us about the individual health effects of almost all toxic chemicals routinely used around people, and hasn't even considered the effects of mixtures of chemicals. Lack of evidence of harm is successfully and incorrectly used as evidence of safety in courts all across Texas. The little evidence of harm is labeled "junk science" while the real junk science, funded by the chemical companies and designed to be inconclusive, is readily accepted under the courts rules of evidence, and by judges and juries, even lawyers, who do not have the tools or knowledge to understand chemical injury. Limiting punitive damages robs the public of one of the last remaining tools to influence irresponsible corporate behavior: the threat to make it too expensive to continue producing a defective or toxic product. Exempting professionals and insurance companies from the Deceptive Trade Practices Act would make it impossible to deter irresponsible behavior. In two recent cases, a heating ventilation and air conditioning engineer falsely certified that sufficient fresh air was being brought into a new school building where children were becoming ill, and several ended up being permanently damaged. And pest control operators falsely advertised that the chemicals they used were safe. Please see that the tort reform is used to enhance, not diminish, the rights of Texans to swift and sure compensation for legitimate injury from chemicals. Please make sure that everyone is equal before the law, and the current preferential treatment of the chemical industry over all others is abruptly ended.

SEIDLITS: Anyone have any questions for Susan? Thank you Susan. All right. Hannah Riddering? I think she had to leave. She's with Texas Now; she's against the bill. Ray Ditmark? Ray Ditmark? HELP Texas; against the bill. Fred I. Lewis. Mr. Lewis here? He's against the bill. Reggie James? Reggie, are you against the bill?

REGGIE JAMES: Particularly after Mr. Walls' testimony, I think that most of the points that I wanted to catch he illustrated I think quite competently. Apparently there are negotiations or discussions going on on this right now, but I'm not a party to those, so I can't very well say what's really on the table or what's not. But I think the real point, and I think it's been made over and over here today, is that maybe there are some areas of the DTPA that could use some fine tuning, but there's an awful big chunk of it that seems to be operating well. I'd hate to see small consumers, or any individual consumer, become collateral damage in a fight over this bill. What I'd really urge the committee to do, and urge the rest of the legislature to do is to do is to parcel out that area. For individual consumers where there's not a problem in the operation of this act, just draw a line right there, and then do the rest of the tinkering in the area where there's trouble, in the big suits where there are sophisticated parties who don't really need the same level of

protection under the act. There were a couple of minor points that I wanted to bring up. One was a question that Representative Ramsay had raised about why should a person be held liable in an innocent misrepresentation case, like when the realtor says it's 2,000 square feet and it turns out to be 1,500. One is because they've made a representation that the consumer relied on. The other reason is because the realtor can avoid that by how they make the representation. If they just say it's 2,000 square feet, period, I think they are making a representation they should be held to. On the other hand, if they say "in the deed records it's listed as..." or "on the listing it's listed as 2,000" and they provide some indication to the ultimate purchaser that they're not positive about it, but this is what their knowledge is, I think we're in a better situation. They're giving out better information and they're protecting themselves from some liability. One other thing in the bill that wasn't mentioned is that there's a 50% bar to recovery for contributory negligence on the part of consumers. Here we have an act where you have to show more than gross negligence to find liability under this act. You would bar the plaintiff if they were 50% responsible in negligence. I think that's an unfair treatment under this bill. I think it's even the wrong idea to use in the Deceptive Trade Practices statute to begin with. One is because you're trying to protect people, and particularly some people that are in vulnerable situations. Elderly people that may be relying on someone to help them invest their retirement funds. So I can see where you might charge the person with not making their injury worse after they've been harmed under DTPA and holding them to that, saying that they can't recover more after they have already been injured. But to bar their recovery for negligence I think is punishing the victim. I think we also saw that all these roads keep leading back to insurance, and that's where I'd like to conclude my remarks. I just want to point out the fact that there are other bills that are filed this session that will have I think really tough consequences for consumers. There's a bill right now that was filed by Representative Duncan that's considering significant changes to Article 21.21. So there's the big chance that we're going to leave a lot of the consumer protection on 21.21, and if we're whittling away at the DTPA on this end, we're going to be left with nothing. Not a choice of which one we can use, but nothing at all. That concludes my remarks. I'll follow that up with any specific information you have.

SEIDLITS: Any questions for Reggie? All right.

JAMES: Thank you.

SEIDLITS: Thank you. Tim Curtis? Texas Citizen Action.

TIM CURTIS: Good morning, I'm Tim Curtis. I'm the executive director of Texas Citizen Action. We represent over 150,000 households in the state of Texas. I was a little taken aback that you guys would stop the fun and games long enough to hear Tom Uhertz's [?] bill, but then I realized what it was about, and realized again that when you guys start having to vote on these, it might really mean something to you quicker than you'd hoped. I hope that none of you become former members because of these votes. But, isn't it pitiful that we have so many businesses that are being picked on by the consumers of this state? We've had a parade of so-called professionals who have asked to be allowed to be deceptive in their trade practices. Does this bill help the responsible businesses of Texas? I don't think so. Does it help Mr. Weekly's business? It doesn't sound like it. Does it help the business folks that certified Mark's house to be termite free? Yes, it does. We're in a situation where the public perception is that wrongdoers have too many rights, too many loopholes, and too many exemptions. I'm sorry that you have had this brought to you and asked to grant those wrongdoers additional exemptions and not to do what the public wants you to do, and that is to protect the rights of victims. Thank you.

SEIDLITS: Any questions of Mr. Curtis? Thank you, Tim. Anyone else wishing to testify against House Bill 668? Anybody on House Bill 668? Did we miss anyone who wanted to testify for? All right. We'll recognize Representative Junell to close. In his absence, I will close. If there's no objection we'll leave House Bill 668 pending, and we'll refer it to a subcommittee to be named later by the chair. Thank y'all. Thank you for your patience. Thanks for being here. We appreciate the interest that all of you have shown. Subcommittee to be named later by the chair for clarification.

HOUSE STATE AFFAIRS COMMITTEE
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[General discussion about frivolous bills]